Supreme Court, U.S.
FILED

No. (1) 10-939 JAN 19 2011

OFFICE OF THE CLERK

In The Supreme Court of the United States

BARRY E. MUKAMAL, AS LIQUIDATING TRUSTEE AND DIRECTOR AND OFFICER TRUSTEE OF THE LIQUIDATING TRUST AND THE DIRECTORS AND OFFICERS TRUST OF FAR & WIDE CORPORATION; FAR & WIDE TRAVEL CORPORATION, ADVENTURE CENTER, INC.; AFRICAN TRAVEL, INC.; FAR & WIDE INTERNATIONAL, INC.; AND TRAVEL MEDIA SERVICES CORP.,

Petitioners,

v.

PHIL BAKES; ANDREW C. MCKEY; CRAIG TOLL, GEORGE GREMSE; WELLSPRING CAPITAL FUNDING LLC; CARL M STANTON; GREG S. FELDMAN; DAVID C. MARIANO; AND JASON B FORTIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS R. JULIN
Counsel of Record
CRAIG V RASILE

HUNTON & WILLIAMS LLP
Sabadell Financial Center
1111 Brickell Avenue – Suite 2500
Miami, FL 33131
(305) 810-2516 fax 1601
tjulin@hunton com

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

A liquidating trustee appointed under a confirmed liquidating plan of reorganization for a travel service company sued former directors, officers, and controlling shareholders of the company for damaging the company. The trustee's 82-page amended complaint alleged the defendants breached their duties of loyalty and care by using millions of dollars of corporate assets for their personal benefit. The district court dismissed the claims and the U.S. Court of Appeals for the Eleventh Circuit affirmed, applying what it held was a "stricter standard" for pleading than that set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). This case presents the following question:

Whether the pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), is a "stricter standard" than the standard articulated in *Conley v. Gibson*, 355 U.S. 41 (1957).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. There is no parent or publicly held company owning 10% or more of any of the corporate entities.

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INTRODUCTION

After the judicial pendulum had swung too far toward a liberal interpretation of the Rule 8(a) pleading standard articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), this Court started it back toward center in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009). This case demonstrates the need for one further decision to constrain the swing from going too far in the other direction toward a highly restrictive pleading standard that will prevent numerous well-pled federal complaints from being heard.

CITATIONS OF OPINIONS AND ORDERS IN THE CASE

Mukamal v. Bakes, 378 Fed. Appx. 890, 2010 WL 1731775 (11th Cir. Apr. 30, 2010) (App. 1); *Mukamal v. Bakes,* No. 08-14346 (11th Cir. Oct. 21, 2010) (order denying petition for rehearing or rehearing en banc) (App. 60); *Mukamal v. Bakes,* No. 07-20793-Civ-Gold/McAliley (S.D. Fla. Nov. 2, 2007) (order dismissing complaint); *Mukamal v. Bakes,* No. 07-20793-Civ-Gold/McAliley (S.D. Fla. June 26, 2008) (order dismissing amended complaint) (App. 29).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued a decision in this case on

April 30, 2010, and rendered a final judgment on October 21, 2010, by denial of the petitioners' motion for rehearing or rehearing en banc. (App. 1). This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 8(a) states:

> **(a) Claim for Relief.** A pleading that states a claim for relief must contain:
>
> > **(1)** a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> >
> > **(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and
> >
> > **(3)** a demand for the relief sought, which may include relief in the alternative or different types of relief.

Federal Rule of Civil Procedure 12(b)(6) states:

> **(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> * * *

(6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Defendant, Wellspring Capital Management LLC ("Wellspring"), manages a group of private investment portfolio companies, including Loan Capital Funding LLC ("LCF"), a company focused primarily on investing in or acquiring companies. (App. 3). Wellspring and LCF are collectively referred to herein as "the Wellspring Defendants."

The Wellspring Defendants devised a plan in 1999 to consolidate into Far & Wide Corporation various tour operating companies that provided travel related services to consumers and then to sell the consolidated companies to the highest bidder for a substantial profit. (App. 3). Such activity is commonly referred to as a "roll up."

Defendant, Phil Bakes, served as president and chairman of the Far & Wide board and owned 8.7% of its stock. (App. 71). Defendant, Andrew McKey, served as executive vice president, treasurer or secretary and a director of the company and owned 4.4% of its stock. (App. 73). Defendants, Craig Toll and George Gremse, served as chief financial officer and chief operating officer, respectively. (App. 75 & 77).

In order to spark the roll up, the Wellspring Defendants made a $45 million capital investment in

Far & Wide, thereby becoming its largest shareholders. (App. 3). They then placed four members of Wellspring, namely defendants Carl M. Stanton, Greg S. Feldman, David C. Mariano, and Jason B. Fortin, on its six-member board. (App. 3). Bakes and McKey rounded out the board. (App. 71 & 73).

In 1999, Far & Wide[1] also obtained $70 million through secured bank loans. (App. 4). A year later, it obtained an additional $20 million through unsecured loans. (App. 4).

The September 11, 2001, terrorist attacks, and the later outbreak of the SARS virus in Asia, significantly depressed tourism. (App. 4). Nevertheless, several national and international competitors of Far & Wide survived by curtailing their operations. (App. 94). Far & Wide, on the other hand, continued far-flung money-losing operations, amassed a negative net worth of nearly $150 million, and then defaulted on its secured loans. (App. 95). The secured lenders agreed to forbear from exercising their contractual remedies primarily based upon representations of management that the bank group would be paid in full from a subsequent sale. (App. 5).

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[1] Far & Wide was the principal debtor. For convenience, all of the debtors Far & Wide Corporation, Far & Wide Travel Corporation, Adventure Center, Inc., African Travel, Inc., Far & Wide International, Inc., and Travel Media Services Corp are collectively referred to herein as "Far & Wide" or "Debtors."

By August 2002, the lenders' financial consultant, KPMG Advisory Services ("KPMG"), expressed grave concerns that certain financial information provided by the defendant officers and directors about the company was inadequate or unrealistic and demanded that this be corrected immediately. (App. 102). The defendants refused this demand. (App. 102). The Recovery Group ("TRG"), a firm specializing in crisis management that the company's lenders required Far & Wide to retain as a condition of forbearance, advised that the defendants should develop a plan to reduce the company's size and expenditures, so that if the original plan to sell the company failed, it would not be overleveraged with malignant debt. (App. 103). The defendants, desperately clinging to the hope that their massive equity investment in Far & Wide had not been lost, turned a deaf ear to this advice as well. (App. 103-06).

In October 2002, Far & Wide, already deep in debt, obtained two additional senior secured $10 million loans, one from Ableco Finance Corporation, and a second from Wellspring with an interest rate of 10% over prime but not less than 14.75%. (App. 107-08). Far & Wide, controlled by directors who similarly held interests in Wellspring, its largest shareholder, agreed to repay the priority Wellspring loan before all creditors other than Ableco. This loan was made to Far & Wide at a time when the company was not bankable and "spuriously convert[ed]" Wellspring's equity position to a senior secured position without

"materially improv[ing] Far & Wide's dire financial condition." (App. 109).

In July, 2003, when the Ableco $10 million loan came due, Far & Wide could not repay it. (App. 111). Defendants then wasted further corporate assets by extending the loan to January 2004. (App. 111-12). Based upon a severe cash shortage experienced in September 2003, Far & Wide filed for bankruptcy. (App. 63). Far & Wide was liquidated with its assets, which had cost more than $150 million to acquire, being sold for a mere $14 million. (App. 116).

The Lawsuit

The trustee sued the Wellspring Defendants and the officer and director defendants on March 27, 2007, for breach of their fiduciary duties to the company and to its many creditors.[2] (App. 2).

While the suit was pending, this Court rendered its opinion in *Twombly* on May 21, 2007. Far from overruling or receding from *Conley*, the Court reaffirmed and fully explained it. The Court held *Conley* is consistent with the proposition that a complaint must provide "more than labels and conclusions, and a formulaic recitation of elements of a cause of action"

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[2] The petitioners do not seek review of the dismissal of the trustee's claims on behalf of the creditors or the creditors' derivative claims in the amended complaint (counts I, III, IV, V, VI, VII) or the trustee's claims for equitable subordination (count XIII)

and that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 556. These principles, the Court held, impose a "requirement of plausibility." *Id.* at 560.

The Court noted that *Conley* had stated that "a complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,'" *Twombly,* 550 U.S. at 561 (quoting *Conley,* 355 U.S. at 45-46), but explained that in the context of the full opinion it was apparent that this meant only that once a claim had been stated adequately, it then could be supported by showing any set of facts consistent with its allegations. *Twombly*, 550 U.S. at 563. Justice Souter, for the majority, wrote that the "no set of facts" passage had been so often quoted out of context and so puzzling to many that it "has earned its retirement." *Id.* at 563. His opinion did not, however, purport to alter, let alone overrule the essential holding of *Conley* by imposing a "stricter standard," as many courts have since held.

Justices Stevens and Ginsburg, dissented in part, reading the majority's decision, as actually applying a heightened pleading standard. *Id.* at 588.

Shortly after *Twombly,* the Court handed down a per curiam decision in *Erickson v. Pardus,* 551 U.S. 89 (June 4, 2007), reversing dismissal of a prisoner's *pro se* Eighth Amendment complaint which alleged prison officials endangered his life by removing him from hepatitis C treatment. The Tenth Circuit

affirmed because it found the prisoner's allegations of harm conclusory. *Id.* at 92. This Court, citing *Twombly's* quotation of *Conley*, held "Specific facts are not necessary; the statement need only '"give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."'" *Id.* at 93.

The district court, relying on *Twombly*, dismissed the complaint with leave to amend. (App. 8).

The Post-*Twombly* Amended Complaint

The liquidating trustee filed an 82-page, 479-paragraph amended complaint on December 5, 2007. (App. 62). It alleged with great specificity that after September 11, 2001, the defendants, instead of taking essential steps to reduce the operations of the companies in light of the downturn in tourism, insufficiency of resources, and continued losses as advised by independent consultant TRG, measures that could have preserved the company, they desperately continued to try and sell Far & Wide at a grossly inflated price. (App. 63-68 & 96-106). It further alleged that when this failed, they wasted meager remaining unencumbered corporate assets by taking on massive new debt in a fashion that served only to line their own pockets while the company had no chance of survival. (App. 106-12). The specific management decisions made by the defendants were set forth in detail in the amended complaint. (App. 63-68 & 94-117).

The amended complaint explained that the defendant officers failed to timely pay vendors, used customer deposits to fund current operations rather than reserving them for future travel, operated the company with an irreversible negative working capital deficit in excess of $30 million, failed to pay the secured lenders', and did not write down Far & Wide's goodwill in violation of generally accepted accounting principles and FASB regulations in order to artificially prop up the company's financial statements as they desperately searched for a gullible buyer. (App. 96-98 & 107-14).

The amended complaint alleged that TRG discovered the company's dire financial condition and urged that steps be taken to correct it, but that the defendant directors failed to heed the advice because they perceived that taking the recommended steps would reduce the market value of the rolled-up entity and eliminate the profit they might obtain through an inflated sale. (App. 66).

The amended complaint clearly explained that the defendant directors had serious conflicts of interest that motivated them to act in favor of Wellspring and to the detriment of Far & Wide and the minority shareholders. (App. 64-66). The defendants did so through such acts as accepting $20 million in senior secured loans that needlessly drained company assets that were used to pay commitment fees, forbearance fees and interest payments and that preferred Wellspring by elevating its interest in the company from that of a shareholder to a senior secured creditor.

(App. 106-12). These management bandaids actually benefitted Wellspring, its directors and shareholders at the expense of the creditors and minority shareholders of Far & Wide. Indeed, the defendant officers continued to draw large salaries while they unsuccessfully attempted to sell the company. (App. 71, 74, 76, 78). The amended complaint alleged the acts of the defendants:

> were not in good faith as they were not in the interests of the Far & Wide corporate entity as they were in conscious disregard of the duty to maximize the value of the assets owned by the Far & Wide corporate entity and were motivated by advancing the interests of Far & Wide's controlling shareholder, Wellspring, at the expense of and to the detriment to the value of Far & Wide's assets.

(App. 65-66).

Further, the amended complaint alleged that the defendant officers and directors harmed the company by aggressively pursuing deposits from customers while they intentionally concealed the company's true dire financial condition and "knew or should have known it was probable that Far & Wide's customers would never travel." (App. 67).

Finally, Counts VIII through XII alleged the defendants breached their fiduciary duties of loyalty to the company by using the company's dwindling assets to advance their personal interests. (App. 145-59).

Dismissal Under the "Stricter Standard"

The district court held on June 26, 2008, in its order dismissing the amended complaint that in *Twombly* "the previous standard" established by *Conley* had been "abrogated." (App. 32). It held "breaches of the duty of loyalty had to be pled with more particularity" (App. 49) and that notwithstanding the detail of the amended complaint, the trustee had not "'nudged [his] claims across the line from conceivable to plausible,' *[Twombly],* 127 S. Ct. at 1974, as is required to survive a motion to dismiss." (App. 50). The district court used its own assessment of "plausibility" to interpret the allegations as insufficient to demonstrate that the defendants' actions were not taken in good faith, as is required to state a claim under the applicable state law. (App. 48-53). It also utilized the new standard supposedly established in *Twombly* to characterize the complaint as alleging actions which solely harmed *creditors*, rather than *the company* itself, and then dismissed the claims on the theory that applicable state law imposed no duty to creditors. (App. 48-53).

This ruling entirely discounted specific and plausible factual allegations that a "series of actions and decisions" of the defendants wastefully drained millions from *the company* to the defendants in violation of their "duty to act in the best interests of the Far & Wide corporate entity" and that as "a direct and proximate result . . . the Far & Wide corporate entity has suffered damages." (App. 147).

Before the Eleventh Circuit reached its decision affirming the dismissal of both the original and the amended complaints, this Court applied the holding of *Twombly* on May 21, 2009, in a *Bivens* tort action against the U.S. Attorney General and the FBI Director. *Iqbal,* 129 S. Ct. 1937. There, the Court put to rest speculation that *Twombly* would be limited to antitrust cases. *Id.* at 1953 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions'"). It did nothing, however, to suggest that a "heightened" or "stricter" standard than that advanced by *Conley* should be applied.

Justice Souter, the author of the majority opinion in *Twombly,* joined by Justices Stevens, Ginsburg, and Breyer, dissented, in *Iqbal* and in doing so expressed his view that the allegations in the complaint were not merely legal conclusions, but contained "'enough facts to state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1960-61.

When the instant case involving Far & Wide reached the Eleventh Circuit, that Court prefaced its examination of the original and amended complaints with a discussion of the standard established by *Twombly*. "This is a stricter standard than the Supreme Court described in *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)," the Court of Appeals held. (App. 12). It then proceeded to evaluate the allegations of the original and amended complaints through this fogged prism and affirmed both dismissals. (App. 19-28).

Like the district court, the Eleventh Circuit treated the "stricter" pleading standard as allowing it to disregard the allegations of direct harm to the company and to interpret the complaints as alleging the defendants simply failed to take actions that would have benefitted the company's creditors. (App. 21). Specifically, the Court of Appeals held "the district court did not err in dismissing the breach of fiduciary duty claims asserted against the Individual Defendants and Wellspring since the Complaint failed to state sufficient facts 'to state a claim to relief that is plausible on its face.' *Twombly*, 550 U.S. at 570." (App. 20). It treated the detailed and specific allegations of breach of the duty of loyalty as "conclusory" and "not supported by the necessary factual allegations 'to state a claim to relief that is plausible on its face.' *Twombly*, 550 U.S. at 570." (App. 21).

In fact, the allegations of the amended complaint, fairly construed under the *Conley* standard, invoke the principle, recognized by courts inside and beyond Delaware, that "'prolonging an insolvent corporation's life through bad debt may' dissipate corporate assets and thereby harm the value of corporate property." *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1004 (9th Cir. 2005) (quoting *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 350 (3d Cir. 2001)). "'[E]ven in the case of an insolvent firm, poor decisions by directors that lead to a loss of corporate assets and are alleged to be breaches of equitable fiduciary duties remain harms

to the corporate entity itself.'" *Smith,* 421 F.3d at 1005-06 (quoting *Prod. Res. Group, LLC v. NCT Group, Inc.*, 863 A.2d 772, 792 (Del. Ch. 2004)); *cf. Bankr. Servs., Inc. v. Ernst & Young (In re CBI Holding Co., Inc.)*, 529 F.3d 432, 453 (2d Cir. 2008) ("Even the 'benefit' provided by 'further indebtedness' – capital – 'may provide an illusory financial cushion that lulls shareholders into postponing the decision to dissolve the corporation' and thus 'miss an opportunity to cut their losses'") (citation omitted).

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts with this Court's Reaffirmance of the *Conley* Standard in *Twombly* and *Iqbal*

Contrary to the holding of the district court and the Eleventh Circuit below, this Court did not abrogate *Conley v. Gibson* to impose a "stricter" Rule 8(a) pleading standard. Instead, it clarified that *Conley* never was intended to allow the statement of a claim to be based on wholly conclusory allegations which might only later be supported by any set of facts that could be imagined. The *Twombly* and *Iqbal* decisions, in essence, imposed precisely the same pleading standard that *Conley* had imposed while they simultaneously overruled those lower court decisions that had treated *Conley* as a more liberal standard than it actually was.

The Eleventh Circuit's misperception that *Twombly* and *Iqbal* have imposed a "stricter" standard than that imposed in *Conley* has created confusion that is well illustrated by this case. In two separate complaints, the liquidating trustee pled detailed facts demonstrating that the defendants harmed the company itself in order to serve their own interests. If this decision stands, it is likely to result in dismissal of other properly pleaded claims such as the claims pled in this case.

The Eleventh Circuit's misinterpretation of *Twombly* and *Iqbal* is not isolated. The *Twombly* opinion sent "shockwaves" through the federal litigation bar. Colleen McMahain, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 Suffolk U. L. Rev. 851, 852 (2008). "Reaction to *Iqbal* in the academic community and from the plaintiffs' bar was overwhelmingly fierce and negative. Scholars and practitioners called it a 'grave disappointment,' a 'really bad opinion,' and an 'excuse to throw out suits on the pleadings.'" Michael R. Huston, *Pleading with Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 Mich. L. Rev. 415, 417 (Dec. 2010). Another author, commented that "Seemingly without prior warning, the Court abrogated 'the accepted rule.'" Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?* 59 Am. Univ. L. Rev. 553, 554 (2010). "If *Twombly* caused a shock, *Iqbal* struck a blow. A firestorm of protest ensued over *Iqbal's* alleged judicial activism." *Id.* at 555.

After *Iqbal,* Congress undertook an examination of whether it should attempt to overrule the decisions. One witness testified before Congress that "*Twombly* and *Iqbal* may contribute to the phenomenon of vanishing trials, the degradation of the Seventh Amendment right to a jury trial, and the emasculation of private civil litigation as a means of enforcing public law." *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 8 (2009). Two bills are now pending in Congress that would purport to overrule the decisions – one introduced by Senator Arlen Specter, Senate Bill 1504, the Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009), the other introduced by Representative Jerrold Nadler, H.R. 4115, the Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

The *ABA Journal* weighed into the debate erroneously characterizing *Twombly* and *Iqbal* as having "significantly altered federal court pleading standards, requiring plaintiffs to include far more detailed facts in a complaint." Leslie A. Gordon, *For Federal Plaintiffs, Twombly and Iqbal Present a Catch-22,* ABA Journal (Jan. 1, 2011) (http://www.abajournal.com/magazine/article/for_federal_plaintiffs_twombly_and_iqbal_still_present_a_catch-22/). The article went on to say that *Twombly* "held it is no longer enough to give defendants fair notice of a claim and its grounds," even though no such language is found anywhere in the opinion. *Id.*

The article further concluded that "*Twombly* and *Iqbal* create an unfair burden" by imposing upon plaintiffs heavy pre-filing investigatory obligations rather than allowing them to acquire facts through pretrial discovery. The article noted that in cases of discrimination, discovery is often the "only opportunity" to obtain the necessary facts.

A recent empirical study found that the perception that these decisions radically heightened pleading standards in fact has resulted in a significant increase in the dismissal of federal lawsuits. Hatamyar, *supra* at 556. The study concluded: "Notice pleading may not be 'dead' in federal court, but the prognosis is grave." *Id.* at 624.

These reactions to the decisions are wholly inappropriate in light of the fact that this Court simply reaffirmed the *Conley* standard. The Court should grant review in this case to overrule the Eleventh Circuit's erroneous holding that a "stricter standard" pleading has been established.

Only through application of a "stricter standard" of pleading was the Eleventh Circuit able to ignore all allegations of the complaint that the defendants had perpetrated tens of millions of dollars worth of direct harm to the corporation and treated them merely as allegations of harm to Far & Wide's creditors which the Eleventh Circuit then interpreted state law as disallowing.

Petitioner takes no issue with the lower courts' interpretation of state law. Instead, he objects to their

wholesale disregard of allegations that the defendants "breached their fiduciary duties" of loyalty and care "to the Far & Wide *corporate entity* by mismanaging Far & Wide for their own person[al] benefit and for the benefit of Wellspring and LCF, Far & Wide's controlling shareholders, at the expense of the interests of the Far & Wide *corporate entity*." (App. 64) (emphasis added). This general allegation and others were supported with well-pled, specific allegations that "defendants engaged in a self-dealing loan transaction with Wellspring" and that this was not "approved by a majority of disinterested or independent directors, nor were the transactions approved by Far & Wide's minority shareholders." (App. 64). In particular, the amended complaint alleged that the defendants' actions "were not in good faith," and "in conscious disregard of the duty to maximize the value of the assets," and "motivated by advancing the interests of Far & Wide's controlling shareholder." (App. 65).

The Eleventh Circuit conceded that petitioner had alleged the defendants did such direct damage to the company, but, wielding the supposedly stricter standard of *Twombly*, treated these as "conclusory" and "not supported by the necessary factual allegations." (App. 21). The disregard of these allegations allowed the Eleventh Circuit to characterize the amended complaint as alleging "injury only to the Debtors' creditors" and it then proceeded to demonstrate that Delaware law does not recognize a cause of action by *creditors* based on their contention that

the officers and directors should have ceased doing business and liquidate. (App. 22).

Having characterized the claim as one only on behalf of the creditors and not the company, the Eleventh Circuit then proceeded to explain why Delaware law, as reflected in cases such as *Trenwick Am. Litig. Trust v. Ernst & Young, LLP,* 906 A.2d 168, 174 (Del. Ch. 2006); *N. Am. Catholic Educ. Programming Found'n, Inc. v. Gheewalla,* 930 A.2d 92 (Del. 2007); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), does not allow creditors to bring claims against directors and officers based on "'the appropriate exercise of their business judgment'" which deepen the insolvency of the company. (App. 22) (quoting *Trenwick*, 906 A.2d at 174). The Eleventh Circuit noted that creditors have various remedies through contract, fraud claims, bankruptcy law and other means to protect their rights and so had no need to bring a breach of duty claim. (App. 24). Under the *Conley* pleading standard, the complaints in this case cannot fairly be read to assert a claim solely on behalf of creditors. They clearly and specifically set forth plausible factual allegations that the defendants abused their trust by taking actions directly harmful to *the company itself* and that personally benefitted them. They stated classic breach of fiduciary claims that the trustee admittedly had full standing to bring on behalf of the company.

When a company has reached the point of insolvency and prospects of recovery are as dim as they were here as early as October 2002, it may well be

that the company's creditors are the ones who have the strongest interest in ensuring that officers, directors and controlling shareholders do not act in derogation of their interests by simply prolonging the company's operation prior to bankruptcy. It also may be, as the Eleventh Circuit holds, that creditors lack standing under Delaware law to bring breach of fiduciary duty claims directly. But, no court has held that once a company has reached a heightened point of insolvency, its officers, directors, and controlling shareholders may dissipate the company's meager remaining unencumbered assets to line their own nests as alleged in the Far & Wide complaints.

Reversal of the decision below and reinstatement of the amended complaint's claims on behalf of Far & Wide against the defendants should be ordered through application of the *Conley* pleading standard that was reaffirmed in both *Twombly* and *Iqbal*.

II.

The Courts of Appeals are Deeply Divided on Whether the *Twombly/Iqbal* Standard is Stricter than the *Conley* Standard

The Third Circuit has held that "*Conley* has been specifically repudiated by both *Twombly* and *Iqbal*" and announced "new standards." *Fowler v. UPMC Shadyside,* 578 F.3d 203, 211 (3d Cir. 2009). The Seventh Circuit has reached precisely the opposite result in *Brooks v. Ross,* 578 F.3d 574, 581 (7th Cir. 2009), holding that "[a]ny doubt that *Twombly* had

repudiated the general notice-pleading regime of Rule 8 was put to rest in *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)."

The Tenth Circuit regards *Twombly* as establishing a "revised standard." *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008). The Second Circuit holds that *Twombly* did not require a "heightened" pleading standard. *Boykin v. KeyCorp.,* 521 F.3d 202, 213 (2d Cir. 2008) (Sotomayor, J.). The Third and Sixth Circuits have held that *Twombly* creates a "heightened" pleading standard. *Fowler,* 578 F.3d at 210; *Courie v. Alcoa Wheel & Forged Prods.,* 577 F.3d 625, 629 (6th Cir. 2009). One Sixth Circuit judge recently concluded that the Court made no "major change in the law of pleading." *Tam Travel Inc. v. Delta Airlines, Inc.,* 583 F.3d 585, 595 (8th Cir. 2009) (Shepherd, J., dissenting).

The Fourth Circuit treats *Twombly* as "even more favorable to dismissal of a complaint." *Giarratano v. Johnson,* 521 F.3d 298, 304 n.3 (4th Cir. 2008); *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 262 (4th Cir. 2009) (Jones, J., concurring in part and dissenting in part). The D.C. Circuit has described *Twombly* as setting forth a "new pleading standard." *Aktieselskabet AF 21, November 2001 v. Fame Jeans,* 525 F.3d 8, 11 (D.C. Cir. 2008). It also has observed that "[m]any courts have disagreed about the import of *Twombly*." *Id.* at 15 & n.3 (citing cases). The Seventh Circuit does not regard it as a new standard. *Brooks v. Ross,* 578 F.3d 574, 581 (7th Cir. 2009). The Eighth Circuit also has held "*Twombly*

and *Iqbal* did not change [the] fundamental test of Rule 12(b)(6) practice." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009).

The Eleventh Circuit itself has been inconsistent in its interpretation and application of *Twombly*. In *Randall v. Scott,* 610 F.3d 701, 709 (11th Cir. 2010), the court held *Twombly* and *Iqbal* "did not apply a heightened pleading standard." In *American Dental Ass'n v. CIGNA Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010), it expressed its view that this Court has "adopt[ed] a new pleading standard." More often, the Eleventh Circuit has refrained from characterizing the standard as stricter, new, or heightened. *See Speaker v. U.S. Dep't of Health & Hum. Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371 (11th Cir. 2010) (reversing dismissal of complaint); *Edward v. Prime, Inc.*, 602 F.3d 1276 (11th Cir. 2010) (affirming dismissal of three counts and reversing dismissal of fourth); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009); *Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282 (11th Cir. 2007) (affirming dismissal); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007) (courts may not assess the probability of facts, but a plaintiff must "allege[ ] enough facts to suggest, raise a reasonable expectation of, and render plausible" his claim).

Intra-circuit disharmony is not generally, of course, a basis for granting review, *see, e.g., Jones v. Bock,* 549 U.S. 225, 242 n.9 (2007) ("we need not concern ourselves with this possible intracircuit split"), but it illustrates the general confusion that

now exists in the federal courts and the need for clarification that the traditional standard established in *Conley* remains in place and the clarification of *Conley* should no longer be characterized as imposing any stricter standard.

"Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts." *Phillips v. County of Allegheny,* 515 F.3d 224, 230 (3d Cir. 2008). Granting review in the instant case could help greatly reduce the conflict that now exists regarding this important standard and that is preventing numerous well-pled complaints from being heard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS R. JULIN
Counsel of Record
CRAIG V. RASILE

HUNTON & WILLIAMS LLP
Sabadell Financial Center
1111 Brickell Avenue – Suite 2500
Miami, FL 33131
(305) 810.2516 fax 1601
tjulin@hunton.com

Dated: January 19, 2011

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-14346

D. C. Docket No. 07-20793-CV-ASG

BARRY E. MUKAMAL,
as Liquidating Trustee and Director and
Officer Trustee of Far & Wide Corporation, et al.,

Plaintiff-Appellant,

versus

PHIL BAKES,
ANDREW C. MCKEY,
CRAIG TOLL,
GEORGE GREMSE,
LOAN CAPITAL FUNDING, LLC, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 30, 2010)

Before EDMONDSON and PRYOR, Circuit Judges, and CAMP,* District Judge. CAMP, District Judge:

This appeal is from the district court's partial final judgment in a proceeding arising from the bankruptcy of Far & Wide enterprises ("Far & Wide"), a conglomerate of travel companies (collectively, the "Debtors"). The Debtors filed for bankruptcy in the United States Bankruptcy Court for the Southern District of Florida in Miami in September 2003. The bankruptcy court confirmed a liquidating plan of reorganization, which appointed Appellant, Barry Mukamal, ("Appellant" or "Trustee") as trustee of two trusts created to pursue claims on behalf of the Debtors and Debtors' creditors who had voted to accept the liquidation plan. Appellees, the defendants in the district court proceeding, are former directors and officers of Far & Wide (the "Individual Defendants"), as well as Far & Wide's majority shareholder, Wellspring Capital Management, LLC ("Wellspring").

The Trustee brought this action against Wellspring, the Individual Defendants, and several other entities alleging a variety of claims. The claims on this appeal are based on allegations that Wellspring and the Individual Defendants breached their fiduciary duties to the Far & Wide entities. Wellspring and the Individual Defendants moved to dismiss these claims, and the district court found that the Trustee

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* Honorable Jack T. Camp, United States District Judge for the Northern District of Georgia, sitting by designation

failed to state a claim for the alleged breaches of fiduciary duty and granted the motion to dismiss. Upon a review of the record, the parties' briefs, and having the benefit of oral argument, we conclude the district court did not err and we affirm.

I. BACKGROUND

A. The Parties to this Dispute

The principal Debtor, Far & Wide, is a Delaware corporation formed in March 1999 to purchase travel companies. The Individual Defendants were officers and/or served on the board of directors of Far & Wide. Even though Far & Wide was incorporated in Delaware, the majority of its operations were in Florida.

Wellspring is a Delaware corporation that manages private investment partnerships, such as Loan Capital Funding, LLC, which focus on investing in or acquiring companies.[1] Wellspring and the Individual Defendants formed the Debtor companies by consolidating various travel companies. Wellspring invested $45 million in the Debtors and acquired a majority of their stock. Wellspring also required the Debtors to appoint four of its partners to Far & Wide's

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[1] Loan Capital Funding, LLC acted as a conduit between Wellspring and the Debtors. Although the Trustee also named Loan Capital Funding, LLC as a defendant in the underlying litigation, the Court refers to both Wellspring individually and Wellspring and Loan Capital Funding, LLC collectively as "Wellspring".

six-member board of directors. With a majority of the board, Wellspring exercised a controlling interest in the Debtors.

From the time of the company's creation, Far & Wide planned to purchase and consolidate a number of smaller travel companies and to sell the resulting conglomerate to the highest bidder for a profit. Appellant alleges that Wellspring and the Individual Defendants violated their fiduciary duty of loyalty to Far & Wide by pursuing a plan that maximized their own self-interest but was harmful in the long-term to Far & Wide's creditors.

Far & Wide established lines of credit with a number of banks to raise capital. In 1999, the Debtors entered into a loan agreement with a group of banks to infuse $70 million into the Debtors. The Debtors provided their assets as collateral. A year later, the Debtors obtained an additional $20 million in unsecured financing.

B. The Decline of Far & Wide

Time and circumstance, however, intervened in Far & Wide's plan. Fewer travelers took overseas trips after the September 11, 2001, terrorist attacks and the subsequent outbreak of the SARS virus in Asia. Far & Wide faced a liquidity crises when the companies it owned and relied upon for operating funds faltered because of the struggling travel market. As a result, Far & Wide defaulted on the $70 million bank loan. After defaulting, Wellspring and

the Individual Defendants represented to the banks that a single purchaser could still be found to purchase the consolidated travel enterprises. Based on these representations, the banks, which could have foreclosed, instead entered into a forbearance agreement. The banks, however, required the Debtors to hire consultants to aid in the daily operations of the Debtors' business.

In 2002, Far & Wide hired an outside company to solicit potential purchasers. Pursuant to its agreement with the banks, Far & Wide also hired KPMG and The Recovery Group ("TRG"), a firm specializing in turnaround and crisis management. KPMG was retained to review Far & Wide's records and to advise the directors and officers on how better to keep the company's books and records. Far & Wide's management neither implemented TRG's recommendations, nor implemented the bookkeeping and other advice it received from KPMG.

The Trustee alleges that Wellspring and the Individual Defendants, in their attempt to sell the travel enterprises for a sufficient price to obtain a return on their investment, used false and misleading indicators of the Debtors' financial health. In addition, the Trustee alleges that Wellspring and Far & Wide chose not to file for bankruptcy or wind down the Debtors at that time because it would have caused them to lose their $45 million investment. The Trustee alleged Far & Wide was insolvent by April 2002.

In October 2002, the Debtors began a reorganization. Part of that reorganization included two $10 million loans. The Debtors sought and obtained consent to the loans and the restructuring from major creditors. One of the loans came from Wellspring, which charged an interest rate of 10% over prime and not less than 14.75%. Additionally, Wellspring insisted that its loan be repaid before all the claims of the Debtors' other creditors were paid. Wellspring and the Individual Defendants also converted a portion of Wellspring's equity position into a debt claim, which would have higher priority in the event of a bankruptcy. These loans allowed the Debtors to continue operating their businesses. Even though the conditions were arguably unfairly favorable to Wellspring, the Debtors do not allege that Wellspring received any benefit as a result of the loan agreement, which was never repaid. Nor was there any allegation that the loan could have been obtained on more favorable terms. Certain of the Trustee's claims in the district court, however, seek to subordinate the Wellspring loan to other creditors' obligations and to recharacterize Wellspring's $12 million dollar debt claims as equity. The district court denied the motion to dismiss these claims, and the Trustee continues to pursue them in district court.

In July 2003, when the two $10 million loans came due, the Debtors could not repay the loans. Despite being insolvent, the Debtors continued operating the travel businesses, selling trips to customers, and purchasing services from vendors until September 23,

2003 Between July 2003 and September 23, 2003, the Debtors used customers' deposits to pay operating costs. Some of those customers lost their deposits and did not receive their travel arrangements because of the bankruptcy. These customers have priority bankruptcy claims of more than $5.6 million. After bankruptcy, assets for which the Debtors had paid $150 million were sold for a net of $14 million.

C. The Trustee's Allegations in the Complaint and Amended Complaint

The Trustee brought a number of claims against Wellspring and the Individual Defendants based on their having exercised control of the Far & Wide entities. The Trustee stated the following claims in the original Complaint:

1. The individual directors and officers of Far & Wide breached their fiduciary duties to the Debtors.

2. These individuals also breached their fiduciary duties to the Debtors' creditors.

3. These individuals aided and abetted each other in breaching their fiduciary duties to the Debtors and to Debtors' creditors.

4. Wellspring aided and abetted the Individual Defendants' breaches of their fiduciary duties to both the Debtors and the Debtors' creditors.

5. The claims of the Individual Defendants against the bankruptcy estate should be equitably subordinated in the bankruptcy to the claims of other creditors.

6. Wellspring misstated its purported debt claims in the bankruptcy and the debt claims should be recharacterized as equity.

7. Wellspring's claims against the bankruptcy estate should also be equitably subordinated to the claims of the other creditors.

8. Ernst & Young, LLP ("Ernst & Young"), who prepared audited financial statements for the Debtors, aided and abetted the breach of fiduciary duties by Wellspring and the Individual Defendants, breached their duty of care to the Debtors and the Debtors' creditors, and committed professional malpractice.

Subsequently, Ernst & Young and the Trustee agreed to submit the claims against Ernst & Young to arbitration, and the district court granted Ernst & Young's motion to compel arbitration. After Ernst & Young was removed, Wellspring and the Individual Defendants moved to dismiss the Complaint in its entirety pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court denied Wellspring's and the Individual Defendants' motion to dismiss the claims for subordination and for recharacterization of debt (numbers five, six, and seven above), which continue before the district court. The district court dismissed the remaining claims (numbers one, two, three, and four above). With the Court's

permission, Appellant filed an 82 page Amended Complaint on December 5, 2007, which included the following claims:

a. Direct claims of the Debtors against Wellspring and the Individual Defendants for breach of fiduciary duties.

b. Derivative claims of the Debtors' creditors alleging that Wellspring and the Individual Defendants breached fiduciary duties to the Debtors.

c. Direct claims of the Debtors against Wellspring and the Individual Defendants for deceptive and unfair trade practices.

d. Direct Claims by the Debtors against Wellspring and the Individual Defendants for aiding and abetting each other's breach of their fiduciary duties.

e. Derivative Claims by the Debtors' creditors against Wellspring and the Individual Defendants for aiding and abetting each other's breach of their fiduciary duties.

Wellspring and the Individual Defendants moved to dismiss the Amended Complaint. The district court granted the motion, dismissed the Amended Complaint, and entered partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure so that the Trustee could appeal the dismissal of the breach of fiduciary duty claims while the claims for subordination and for recharacterization of debt proceeded in the district court.

D. The Issues on Appeal

Appellant appeals the district court's dismissal of the Debtors' direct claims for breach of fiduciary duty by Appellees, the dismissal of the Debtors' creditors' direct claims against Appellees for breach of fiduciary duty owed to them, and the dismissal of the creditors' derivative claims against Appellees. Appellant also appeals the dismissal of the related aiding and abetting claims. Finally, Appellant appeals the district court's decision to apply Delaware rather than Florida law to the fiduciary duty claims. Appellant does not appeal the dismissal of the deceptive trade practices claims (claim c. above) or the dismissal of the claims against Ernst & Young (claim 8. above), which were compelled to arbitration. The equitable subordination claims, the claim for recharacterization of Wellspring's (claims 5., 6., and 7. above) debt as equity, and a claim against Wellspring for disallowance of a claim in bankruptcy continue in the district court.

II. JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1334, which provides that district courts have original jurisdiction over civil proceedings related to bankruptcy cases brought under Title 11. This Court has jurisdiction over an appeal from the final judgment of the district court pursuant to 12 U.S.C. § 1291. *See also Thigpen v. Smith*, 792 F.2d 1507, 1516 n.15 (11th Cir. 1986)

(federal appellate courts have jurisdiction to review partial final judgments entered pursuant to Fed. R. Civ. P. 54(b)).

III. STANDARD OF REVIEW

This Court reviews the district court's dismissal for failure to state a claim *de novo*, accepting the allegations in the Complaint and Amended Complaint as true and construing those facts in the light most favorable to the Trustee. *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008). The Court reviews a district court's order dismissing claims for lack of standing *de novo*. *Miccosukee Tribe of Indians v. Florida State Athletic Com'n,* 226 F.3d 1226, 1228 (11th Cir. 2000). Finally, the district court's decision to apply Delaware substantive law to the Trustee's claims is a legal question, which the Court also reviews *de novo*. *Grupo Televisa, S.A. v. Telemundo Comm. Group, Inc.*, 485 F.3d 1233, 1239 (11th Cir. 2007).

To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but it must contain sufficient factual allegations to suggest the required elements of a cause of action. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 1964-65 (2007); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007). "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555-56. Nor will mere labels and legal conclusions withstand a 12(b)(6) motion to

dismiss. *Id.* This is a stricter standard than the Supreme Court described in *Conley v. Gibson,* 355 U.S. 41, 45-46, 79 S. Ct. 99, 102 (1957), which held that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly,* 550 U.S. at 577. Under the standard articulated by the Supreme Court in *Twombly,* the complaint cannot suggest the existence of a claim; the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

IV. DISCUSSION

A. Choice of Applicable Law

The Trustee brought this case in Florida, alleging that the Individual Defendants and Wellspring breached fiduciary duties owed to Far & Wide and its creditors. Although the acts forming the basis of the Trustee's claims occurred largely in Florida, both Far & Wide and Wellspring were incorporated in Delaware. The district court held that Delaware law, not Florida law, applied to the substantive claims asserted by the Trustee. On Appeal, Appellant contends that the district court erred by applying Delaware law.

The district court had jurisdiction of this matter pursuant to 28 U.S.C. § 1334. Federal courts sitting in diversity apply the forum state's choice of law rules. *United States Fid. & Guar. Co. v. Liberty Surplus Ins.*

Corp., 550 F.3d 1031, 1033 (11th Cir. 2008); *Grupo Televisa*, 485 F.3d at 1240. Federal courts have adopted this principle in cases arising under 28 U.S.C. § 1334, when the underlying rights and obligations of the parties are defined by state law. *See Official Comm. of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Sec. Corp.*, No. 00-8688, 2002 WL 362794, *5 (S.D.N.Y. Mar. 6, 2002). The Trustee filed this action in Florida; therefore, Florida's choice of law rules apply.

The fiduciary duties owed to a corporation by its officers and directors concern the internal affairs of a corporation. *See Edgar v. Mite Corp.*, 457 U.S. 624, 645, 102 S. Ct. 2629, 2642 (1982) ("matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders" are a corporation's internal affairs); *see also Nagy v. Riblet Prods. Corp.*, 79 F.3d 572, 576 (7th Cir. 1996) (applying the internal affairs doctrine to claims of breach of fiduciary duty by a controlling shareholder). The Florida Business Corporation Act provides that the internal affairs of a corporation are governed by the laws of the state of incorporation. Fla. Stat. § 607.1505(3); *Chatlos Found., Inc. v. D'Arata*, 882 So. 2d 1021, 1023 (Fla. 5th DCA 2004) (applying the internal affairs doctrine as codified by the Florida Not for Profit Corporation Act, which is identical to Fla. Stat. § 607.1505(3)).

> [The Florida Business Corporation Act] does not authorize this state to regulate the organization or internal affairs of a foreign

> corporation authorized to transact business in this state.

Fla. Stat. § 607.1505(3). The Restatement (Second) of Conflict of Laws also provides that the internal affairs of corporations are governed by the laws of the state of incorporation. *See* Restatement (Second) of Conflict of Laws §§ 302-9 (1971).

As claims concerning the internal affairs of Far & Wide, the fiduciary duty claims asserted by the Trustee are governed by the law of Delaware, the state of incorporation. Fla. Stat. § 607.1505(3); *Chatlos,* 882 So. 2d at 1023. An exception to the internal affairs doctrine exists in the "unusual case" where the forum state has a more significant relationship to the parties and the occurrence. Restatement (Second) of Conflict of Laws §§ 302, 306, 309. The Trustee contends that Florida has a more significant relationship to this dispute, and, thus, the internal affairs doctrine should not apply to this case. As the district court noted, however, the Trustee has not shown that Florida has the type of overriding interest in applying its laws to this dispute so as to rebut the presumption that the laws of the state of incorporation apply to claims for breach of fiduciary duty by officers, directors, and a majority shareholder. *See* Restatement (Second) of Conflict of Laws § 6 (1971) (setting forth factors to consider for determining whether a forum other than the state of incorporation has a more significant relationship to the parties or occurrence). Accordingly, the district

court was correct to apply Delaware law to the substantive claims in this dispute.

B. Appellant's Attempt to Bring Creditors' Claims Directly Against Wellspring and the Individual Defendants

In the original Complaint, the Trustee sought to bring claims against the Individual Defendants and Wellspring for breaching a fiduciary duty owed directly to the creditors after the Debtors became insolvent. *See supra* Part I.C. claims 2-4. In the Amended Complaint, the Trustee attempted to bring derivative claims on behalf of the creditors based on the Individual Defendants' and Wellspring's breaches of fiduciary duties owed to the Debtors. *See supra* Part I.C. claims b,d. The district court dismissed the direct creditor claims in the original Complaint, holding Delaware law did not recognize direct creditor claims under *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla, et al.*, 930 A.2d 92, 101 (Del. 2007). The district court alternatively held that the Trustee did not have standing to bring direct creditors' claims on behalf of less than all creditors under *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S. Ct. 1678 (1972), and *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 986 (11th Cir. 1990). The district court dismissed the derivative claims as duplicative and a waste of judicial resources. We find that the district court was correct for the following reasons.

1. Delaware Law Does Not Recognize Direct Claims for Breach of Fiduciary Duty by the Debtors' Creditors.

The original Complaint asserted three direct claims on behalf of the Debtors' creditors against Wellspring and the Individual Defendants for breach of fiduciary duty. The Trustee argued that both the Individual Defendants and Wellspring owed fiduciary duties directly to the Debtors' creditors once Far & Wide became insolvent. The district court dismissed the creditors' direct claims for breach of fiduciary duty under Delaware law. Appellant appeals the dismissal as error.

Delaware law recognizes that officers and directors are given wide latitude to run a corporation as they see fit for the benefit of shareholders. *Michelson v. Duncan,* 407 A.2d 211, 217 (Del. 1979). Appellant argues, therefore, that the directors' and officers' duties change once a corporation becomes insolvent because Delaware courts have long recognized that, when a corporation becomes insolvent, its property must be administered as a trust fund for the benefit of creditors. *See Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.,* 1991 WL 277613, at *1155 n.55 (Del. Ch. 1991) (describing the "curious" incentives and divergence of interests creditors and directors face during insolvency); *Bovay v. H.M. Byllesby & Co.* 38 A.2d 808, 813 (Del. 1944).

Appellant contends that, upon insolvency, the officers and directors owe a fiduciary duty directly to

creditors, which requires them to maximize the company's value for the creditors, as the corporation's residual value holders. *See, e.g., Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 787-88 (Del. Ch. 1992) (suggesting that a fiduciary duty to creditors arises at insolvency); *see generally* Richard M. Cieri & Michael J. Riela, *Protecting Directors and Officers of Corporations That Are Insolvent: Important Considerations, Practical Solutions,* 2 DePaul Bus. & Comm. L.J. 295, 301-02 (2004) (drawing the inference from prior Delaware authority that insolvency alters the nature of fiduciaries' duties); Laura Lin, *Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors,* 46 Vand. L. Rev. 1485, 1512 (1993) (same).

The Delaware Supreme Court provided clear guidance on this issue in *Gheewalla,* 930 A.2d at 101. In *Gheewalla,* a creditor of a Delaware corporation brought direct claims for breach of fiduciary duty against three of the corporation's directors. *Id.* at 94. The complaint alleged that three directors used their control of the corporation to favor Goldman Sachs in violation of their fiduciary duties to the corporation. *Id.* The directors moved to dismiss the complaint for failure to state a claim. *Id.*

The Delaware Supreme Court held that creditors of an insolvent company do not have a direct claim against directors or managers for breach of fiduciary duty. *Id.* The Court explained that under Delaware law, "[d]irectors owe their fiduciary obligations to the corporation and its shareholders." *Id.* at 99. Because

directors and officers do not owe a fiduciary duty to creditors, even after insolvency, the district court correctly dismissed the Debtors' creditors' direct claims for breach of fiduciary duty.

C. The Creditors' Derivative Claims Are Mirror Images of the Debtors' Claims and Cannot be Brought in the Same Action.

In the Amended Complaint, the Trustee also brought derivative claims by the Debtors' creditors. These claims attempt to assert derivatively the identical direct claims of the Debtors for breaches of fiduciary duty and depend on the same factual allegations. The district court referred to them as "mirror images" of the Debtors' claims and, in a well-reasoned analysis, dismissed these derivative claims as duplicative of the Debtors' direct claims.

A plaintiff may only recover from a defendant once for a single claim. *See St. Luke's Cataract & Laser Inst., P.A. v. Sanderson,* 573 F.3d 1186, 1203 (11th Cir. 2009). If the Debtors succeed on the direct claims against the Individual Defendants then the creditors' derivative claims must fail because the Individual Defendants cannot be liable twice for the same claim. *See Gen. Tel. Co. v. EEOC,* 446 U.S. 318, 333, 100 S. Ct. 1698, 1708 (1980) ("courts can and should preclude double recovery by an individual"); *White v. United States,* 507 F.2d 1101, 1103 (5th Cir. 1975) ("no duplicating recovery of damages for the

same injury may be had").[2] If, however, the Debtors' direct claims fail to state a claim then the creditors' derivative claims must also fail because the claims are based on the same factual allegations. Accordingly, this Court affirms the district court's dismissal of Counts III, IV, V, VI, and VII of the Amended Complaint.

D. Appellant's Complaint and Amended Complaint Failed to State a Claim for Breach of Fiduciary Duty by Defendants.

The Trustee does have standing to bring direct claims for breach of fiduciary duty on behalf of the Debtors. The Amended Complaint alleges that Wellspring and the Individual Defendants breached both the fiduciary duty of loyalty and the fiduciary duty of care owed to the Debtors. The claims are based on allegations that the Individual Defendants and Wellspring operated Far & Wide with the goal of continuing its operations until it could be sold for a profit and refused to take other measures that may have better preserved its value for the creditors. The Trustee specifically focuses on the secured loan transaction between the Debtors and Wellspring in October 2002 as a primary example of this breach of duty.

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[2] Fifth Circuit decisions rendered on or before September 30, 1981, are binding precedent on this court *See Bonner v City of Prichard,* 661 F 2d 1206, 1209 (11th Cir 1981) (en banc)

The Trustee contends that Wellspring was preferred over other shareholders, and that the Individual Defendants, as interested inside directors, are not entitled to the protection of the business judgment rule. The Trustee contends that because the Individual Defendants are not protected by the business judgment rule, the burden shifts to the Individual Defendants and Wellspring to demonstrate that the loan was "entirely fair." For the following reasons, this Court finds that the district court did not err in dismissing the breach of fiduciary duty claims asserted against the Individual Defendants and Wellspring since the Complaint failed to state sufficient facts "to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570.

1. The Duty of Loyalty

Under Delaware law, "[t]he essence of the duty of loyalty is that 'corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.'" 1-4 Corporate Governance: Law and Practice § 4.03 (quoting *Guth v. Loft,* 5 A.2d 503, 510 (Del. 1939)). The duty of loyalty requires a fiduciary to act in the best interests of the corporation. *Cede & Co. v. Technicolor, Inc.,* 634 A.2d 345, 361 (Del. 1993) ("the duty of loyalty mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a . . . controlling shareholder and not shared by the stockholders generally.") A claim for breach of the duty of loyalty under Delaware law exists where

(1) the company is harmed or (2) a fiduciary personally profits from a corporate opportunity. *See Oberly v. Kirby,* 592 A.2d 445, 463 (Del. 1991) (holding a breach of the fiduciary duty of loyalty can exist where either the beneficiary is harmed or the fiduciary uses knowledge gained from his position to advance his independent interests).

The Amended Complaint alleges that the Individual Defendants and Wellspring breached the duty of loyalty by favoring the interests of Wellspring over those of the Debtor. In short, the Amended Complaint alleges that the Individual Defendants managed Far & Wide for the benefit of a majority shareholder and that Far & Wide obtained a loan from Wellspring in October 2002, which allowed the company to continue to run its troubled businesses rather than preserving its value for the creditors.

As a threshold matter, the conclusory allegations concerning breach of the duty of loyalty in both complaints are not supported by the necessary factual allegations "to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. Moreover, the Trustee alleges injury only to the Debtors' creditors. For example, the Amended Complaint alleges that the decision to accept the loan from Wellspring in 2002 and continue operating the business "resulted in the diminution in value of Far & Wide's assets to a point where Far & Wide did not have any ability to pay its liabilities to its creditors when bankruptcy protection was finally sought. . . ."

In order to state a claim for breach of the duty of loyalty, the Trustee must allege facts that indicate either Far & Wide or its minority shareholders, not Far & Wide's creditors, were injured by the action of the Individual Defendants. *See Cede & Co.*, 634 A.2d at 361 (stating that a breach of the duty of loyalty can exist where a fiduciary pursues his own interest over that of the shareholders). Neither the Complaint nor the Amended Complaint contain sufficient factual allegations to support such a claim. The Trustee does not allege facts demonstrating that the majority shareholders were preferred in any way over the minority shareholders. No allegations indicate that the loan could have been obtained on more favorable terms, that the Individual Defendants personally benefitted, or that Wellspring benefitted at all since the loan was never repaid.

The only injury alleged in the Amended Complaint was to the Debtors' creditors as a result of Far & Wide staying in business longer and deepening its insolvency, when it would have been in the best interest of the creditors for Far & Wide to cease business and liquidate. Delaware law, however, does not recognize a cause of action for "deepening insolvency." *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 174, 204 (Del. Ch. 2006).

> Even when a firm is insolvent, its directors may, in the appropriate exercise of their business judgment, take action that might, if it does not pan out, result in the firm being painted in a deeper hue of red. The fact that

> the residual claimants of the firm at that time are creditors does not mean that the directors cannot choose to continue the firm's operations in the hope that they can expand the inadequate pie such that the firm's creditors get a greater recovery.

Id. at 174.

The Trustee alleges that the actions taken by the board of directors were done so that the company could continue operating in an attempt to facilitate a sale of the corporation to a third party. The sale, however, would have maximized the value to *all* shareholders. Recent Delaware cases hold that officers and directors do not breach the duty of loyalty by exercising their business judgment and continuing to operate an insolvent corporation rather than entering bankruptcy and preserving assets to pay creditors. *Trenwick,* 906 A.2d at 174; *Gheewalla,* 930 A.2d at 99 (explaining that the general rule is that directors of a corporation do not owe creditors duties beyond the relevant contractual terms).

In fact, *Gheewalla* presents an analogous factual situation. In *Gheewalla,* a creditor of Clearwire Holdings, Inc. ("Clearwire") sued several directors of Clearwire for breach of fiduciary duty. *Gheewalla,* 930 A.2d at 94. The creditors alleged that the directors breached their fiduciary duties once Clearwire became insolvent and effectively went out of business because the directors allowed the corporation to continue holding certain licenses. *Id.* at 97-99. Holding onto these licenses required large expenditures of

cash each month, which otherwise would have been available for creditors had the corporation liquidated. *Id.* at 97-99 The Delaware Supreme Court stated:

> It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders. While shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights.

Id. at 99. All these remedies are available to the creditors in the present situation, and they continue to pursue some in the district court. If they were wronged, they have ample recourse, but the remedies do not include bringing a claim for breach of fiduciary duty where the only alleged injury is a deepening insolvency which harmed only creditors.

Since Delaware law does not recognize a duty to liquidate, and the Amended Complaint fails to allege sufficient facts to demonstrate the necessary elements of a claim for breach of the duty of loyalty to the Debtors, the district court did not err in dismissing Appellant's claim for breach of the fiduciary duty of loyalty.

2. The Duty of Care

"The fiduciary duty of care requires that directors of a Delaware corporation use that amount of care which ordinarily careful and prudent men would use in similar circumstances, and consider all material information reasonably available in making business decisions." *In re Walt Disney Co.,* 907 A.2d 693, 749 (Del. Ch. 2005) (internal quotation and citation omitted). A deficiency in the process employed by the directors is only actionable as a breach of the duty of care if the director's actions are "grossly negligent." *Id.* Gross negligence includes a director's failure to inform him or herself of available material facts when making a decision on behalf of the corporation. *See In re Walt Disney Co.,* 906 A.2d 27, 64-64 (Del. Super. Ct. 2006); *Smith v. Van Gorkhom,* 488 A.2d 858, 874 (Del. 1985) (holding that board members who voted to approve a merger without reviewing any documentation regarding the adequacy of the proposed purchase price violated the duty of care), *overruled on other grounds by Gantler v. Stephens,* 965 A.2d 695, 713 n.45 (Del. 2009); *Cede & Co. v. Technicolor,* 634 A.2d 345, 367-68 (Del. 1993) (holding that the duty of care requires directors to act on an informed basis). Simply put, the standard is procedural, rather than substantive. In fact, Delaware law allows a company's board to even make an "irrational" decision, so long as the decision-making process employed by the board "was either rational or employed in a *good faith* effort to advance corporate interests." *In re Caremark Int'l Derivative Litig.,* 698 A.2d 959, 967 (Del. Ch. 1996)

(emphasis in original). Thus, directors who make a decision after employing a rational decision-making process and considering the pertinent information will not be liable for a breach of the fiduciary duty of care. *In re Caremark,* 698 A.3d at 967; *Cede & Co.,* 634 A.2d at 367-68. Moreover, even upon insolvency, the duty of care to the corporation remains the same. *Gheewalla,* 930 A.2d at 101.

The Amended Complaint fails to allege that the Individual Defendants did not employ a rational decision-making process or did not consider material information when making the decision to obtain additional loans and continue operating Far & Wide rather than proceed into bankruptcy. The Amended Complaint alleges only that the Individual Defendants "refused or failed to follow [the] advice" of the two independent consultants hired by Far & Wide's management. To state a claim for breach of the duty of care under Delaware law, a plaintiff must allege more than that the directors and officers of a corporation received information from outside consultants, but decided not [to] follow this advice. *Cede & Co.,* 634 A.2d at 367-68. Here, the Individual Defendants discharged their obligations under the duty of care by hiring consultants and by considering the consultants' advice, even if they did not follow the advice. *Id.* Accordingly, the district court properly dismissed Counts VI and XI of the Amended Complaint.

E. The Amended Complaint Failed To State A Claim for Aiding and Abetting a Breach of Fiduciary Duty.

In order to state a claim for aiding and abetting a breach of fiduciary duty under Delaware law, a plaintiff must allege: (1) the existence of a fiduciary relationship, (2) that the fiduciary breached its duty, (3) that a defendant, who is not a fiduciary, knowingly participated in the breach, and (4) that damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary. *Gotham Partners L.P. v. Hallwood Realty Partners, et al.*, 817 A.2d 160, 172 (Del. 2002) (quoting *Wallace v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999)). The Amended Complaint alleges that the Individual Defendants and the Wellspring Defendants aided and abetted each others' breaches of fiduciary duties.

The underlying breaches of fiduciary duty that form the basis for the Debtors' claims for aiding and abetting are the same breaches of fiduciary duty that the Court finds fail as a matter of law. *See supra* Part IV.D.1-2. Because the underlying breach of fiduciary duty claims fail, the claims that Wellspring and the Individual Defendants aided and abetted those breaches must follow suit. *See Gotham Partners*, 817 A.2d at 172 (a claim for aiding and abetting a breach of fiduciary duty requires that the fiduciary breach its duty). The district court correctly dismissed the aiding and abetting claims, and this Court affirms the district court's dismissal of Counts IV, VII, IX, and XII.

V. CONCLUSION

For the foregoing reasons, this Court **AFFIRMS** the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 07-20793-CIV-GOLD/McALILEY

BARRY E. MUKAMAL, AS LIQUIDATING TRUSTEE AND DIRECTOR AND OFFICER TRUSTEE OF FAR & WIDE CORP., ET AL.,

Plaintiffs,

vs.

PHIL BAKES, ANDREW C. McKEY, CRAIG TOLL, GEORGE GREMSE, WELLSPRING CAPITAL MANAGEMENT LLC, LOAN CAPITAL FUNDING LLC, CARL M. STANTON, GREG S. FELDMAN, DAVID C. MARIANO, and JACOB B. FORTIN,

Defendants. /

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE is before the Court on Defendants' Rule 12(b)(6) Motion to Dismiss Counts I through XVI of Amended Complaint with Prejudice [DE 48]. The parties have filed a Response [DE 54] and Reply [DE 57], and I held a hearing on the motion on April 18, 2008. During the hearing, Plaintiff conceded that Counts II, IV, and VI of the Original Complaint, which were previously dismissed without prejudice,

should be dismissed with prejudice as discussed in my previous Order On Defendants' Motions to Dismiss [DE 40] (the "Nov. 2 Order").

This case arises from an adversary bankruptcy proceeding involving Far & Wide enterprise ("Far & Wide"), a conglomeration of travel companies consisting of Far & Wide Corporation, Far & Wide Travel Corporation, Adventure Center, Inc., African Travel, Inc., Far & Wide International, Inc., and Travel Media Services Corporation (collectively, the "Debtors"). The allegations asserted by Plaintiff Barry Mukamal, as liquidating trustee and director and officer trustee of Far & Wide Corporation, which must be taken as true in deciding a motion to dismiss, are stated in the Nov. 2 Order and need not be duplicated here. To the extent that the Amended Complaint includes new allegations, I will discuss these new allegations where necessary.

On December 5, 2007, following dismissal of Counts I through VI of the Original Complaint, Plaintiff Mukamal filed an 82-page Amended Complaint consisting of sixteen counts encompassing 480 paragraphs. (*See* Am. Compl., DE 48). The allegations in the Amended Complaint fall into the following categories: (1) derivative creditors' claims, consisting of Counts I, and III through VII; (2) direct Debtors' claims, consisting of Counts II and VIII through XII; and, (6) bankruptcy claims, consisting of Counts XIII through XVI. The direct claims can be further categorized into: (1) a deceptive and unfair trade practices claim (Count II); (2) breach of fiduciary duty of loyalty

and related aiding and abetting claims (Counts VIII,[1] IX and X); and, (3) breach of fiduciary duty of care claims (Counts XI and XII). The derivative claims, which are mirror images of the direct claims, are pled in the alterative.[2]

I have reviewed Defendants' Motion and related pleadings, as well as the applicable case law, and having considered the parties' arguments, I conclude that Defendants' motion must be granted in its entirety.

II. [sic] Standard of Review

In determining whether to grant a motion to dismiss, the court must accept all the factual allegations in the complaint as true and evaluate all inferences derived from those facts in the light most favorable to the plaintiff. *Hoffend v. Villa,* 261 F.3d 1148, 1150 (11th Cir. 2001).

Although a plaintiff need not state in detail the facts upon which he bases his claim, Fed. R. Civ. P.

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[1] As a result of a clerical error, the Amended Complaint labels both the derivative claim for aiding and abetting breach of duty of care and the direct debtor claim for breach of duty of loyalty as Count VII In this Order, I have re-labeled the latter as Count VIII.

[2] Specifically, the derivative claims are pled as. (1) deceptive and unfair trade practices claim (Count I); (2) breach of duty of loyalty and related aiding and abetting claims (Counts III, IV, and V), and, (3) breach of duty of care claims (Counts VI and VII)

8(a)(2) "still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965 n.3 (2007). In other words, a plaintiff's pleading obligation requires "more than labels and conclusions." *Id.* at 1964-65; *see also Pafumi v. Davidson,* No. 05-61679-CIV, 2007 WL 1729969, at *2 (S.D. Fla. June 14, 2007). The previous standard that there be "no set of facts" before a motion to dismiss is granted has thus been abrogated in favor of the requirement that a pleading must be "plausible on its face." *Bell Atl.,* 127 S. Ct. at 1968, 1974 (discussing *Conley v. Gibson,* 355 U.S. 41 (1957)); *see also, Watts v. Fla. Int'l Univ.,* 495 F.3d 1289, 1295 (11th Cir. 2007) ("While Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because it strikes a savvy judge that actual proof of those facts is improbable, the factual allegations must be enough to raise a right to relief above the speculative level.") (citing *Bell Atl.,* 127 S. Ct. at 1965) (internal quotations omitted)). In order to survive a motion to dismiss, the Plaintiff must have "nudged [her] claims across the line from conceivable to plausible." *Bell Atl.,* 127 S. Ct. at 1974.

III. [sic] Analysis

A. Governing Law for Counts III through XII of the Amended Complaint

Where the rights and obligations of the parties are defined by state law, federal courts presiding over cases brought pursuant to the grant of jurisdiction under 28 U.S.C. § 1334, which covers civil actions

related to bankruptcy proceedings, must apply the forum state's choice of law doctrines. *Official Comm. of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Sec. Corp.,* No. 00-8688, 2002 WL 362794, *5 (S.D. N.Y. Mar 6, 2002); Nov. 2 Order at p. 20-21. The Florida legislature has codified the internal affairs doctrine for certain types of claims, including alleged breaches of fiduciary duties. *See* Nov. 2 Order at p. 26, n. 2. Specifically, the Florida Business Corporation Act ("FBCA") provides that "[t]his act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state." Fla. Stat. § 607.1505(3); *see also Chatlos Found., Inc. v. D'Arta,* 882 So.2d 1021, 1023 (Fla. 5th DCA 2004) (holding that claims "involving 'internal affairs of corporations, such as the breach of fiduciary duties, are subject to the laws of the state of incorporation.") (quoting *Davis & Cox v. Summa. Corp.,* 751 F.2d 1507, 1527 (9th Cir. 1985)); Restat. 2d. of Conflict of Laws, § 309 (law of state of incorporation generally determines director and officer liability to corporation, creditors and shareholders).

The language of section 1505(3) of the FBCA "came verbatim from section 15.05 of the Model Business Corporation Act" ("MBCA"), *Legal Envtl. Assistance Found. v Dep't of Envtl. Protection,* 702 So. 2d 1352, 1355 (Fla. 1st DCA 1997) (Benton, J., dissenting), and Florida courts have deemed the MBCA's official commentary to be persuasive in interpreting the FBCA. *See Winner v. Cataldo.,* 559

So. 2d 696, 697 (Fla. 3d DCA) (applying MBCA official commentary to interpret FBCA). The official commentary to section 15.05 of the MBCA states that the section "preserves the judicially developed doctrine that internal affairs are governed by the state of incorporation even when the corporation's business and assets are located primarily in other states." MBCA 15.05, Official Comment, pp. 15-16. Under these principles, Florida's choice-of-law analysis for fiduciary duty claims is a one-step test that depends solely upon the identity of the [state] of incorporation. In this case, Far & Wide is a Delaware corporation; therefore, under the codified internal affairs doctrine, Delaware law applies to Counts III through XII of the Amended Complaint.[3]

The application of the internal affairs doctrine does not contravene the holding in *Grupo Televisa, S.A. v. Telemundo Communs. Group, Inc.*, 485 F.3d 1233 (11th Cir. 2007), that "Florida resolves conflict-of-laws questions according to the 'most significant relationship' test outlined in the Restatement (Second) of Conflict of Laws." *Id.* at 1240 (citing *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980)).[4] Section 145 provides that "[t]he rights and

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[3] The parties are in agreement that Counts I and II, which are statutory claims based on FDUTPA, are governed by Florida law, and that Counts XIII through XVI, the equitable bankruptcy priority claims, are governed by federal bankruptcy law

[4] *Telemundo* is the Eleventh Circuit's most recent statement of Florida's choice-of-law rules.

liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." Restat, 2d of Conflict of Laws, § 145. Section 6, in turn, provides that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." *Id.* at § 6. Under the Restatement, then, I must follow the statutory direction of the FBCA which has codified the internal affairs doctrine and apply the law of the State of Delaware to the breach of fiduciary duties claims (Counts III through XII).

B. Derivative Creditors' Claims

I have previously dismissed with prejudice all direct claims alleged by Plaintiff in the original complaint on behalf of all the creditors in this action. (*See* Nov. 2 Order). These claims were based upon the purported assignment of claims belonging to Far & Wide's individual creditors. In dismissing them, I concluded that Plaintiff lacks standing to bring direct claims on behalf of the creditors because Plaintiff has failed to obtain assignments from *all* of the creditors. (*See* Nov. 2 Order at p. 19). Plaintiff now seeks to circumvent the dismissal of the creditors' claims by alleging mirror images of each of the Debtors' claim [sic] brought in the alternative and derivatively on behalf of all creditors of the estate of the Far & Wide corporate entity. Defendants argue that the derivative

claims must be dismissed with prejudice as procedurally barred and entirely duplicative of the direct claims. Plaintiff responds that the claims are brought in the "alternative" and that this Court has expressly recognized, in the Nov. 2 Order, that Plaintiff has standing to bring a derivative action on behalf of all the creditors. Mukamal's argument misses the point.

As discussed in my previous order, "creditors of an insolvent corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties." *N. Am. Catholic Programming Found. v. Gheewalla,* 930 A.2d 92, 101-02 (Del. 2007). However, a "derivative" action is a suit brought "in the corporation's name where those in control of the company refused to assert a claim belonging to it." *Aronson v. Lewis,* 473 A.2d 805, 811 (Del. 1984); *see also Mims v. Fail (In re VarTec Telecom, Inc.),* Bankr. No. 04-81694-HDH-7, Adv. No. 06-03506, 2007 WL 2872283, at **3-4 (Bankr. N.D. Tex. Sept. 24, 2007) ("The essence of a derivative action is that it is brought in the stead of a direct action brought by the corporation itself."). In the context of a bankrupt company, a derivative action is brought by the creditors themselves, on behalf of all the creditors, because the Trustee did not bring such a claim against the debtor's directors and officers on behalf of the estate. (Nov. 2 Order at p. 29).

In this case, the Plaintiff is seeking to assert each substantive claim twice: both as a direct claim against the directors and officers on behalf of the estate, and as a derivative claim against the directors

and officers on behalf of the creditors. He cannot do so. The fact that he pleads these claims in the alternative is of no avail. If the direct claims fail on the merits, so do the derivative claims. On the other hand, if the direct claims succeed on the merits, the derivative claims are barred because the directors and officers cannot be liable twice for the same claims. As such, Counts I, III, IV, V, VI and VII, brought in the alternative and as derivative claims of the creditors, are procedurally barred and duplicative, and must be dismissed with prejudice. My ruling is not that a Trustee such as Mukamal does not have standing, under Delaware law, to bring creditors' derivative claims under the appropriate circumstances; rather, having chosen to pursue the substantive claims as direct Debtors' claims, he is procedurally barred from re-asserting them as derivative claims.

C. Direct Debtors' Claims

a. Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") (Count II)

In Count II, Plaintiff asserts a claim against the Individual Defendants and Wellspring under FDUTPA, Fla. Stat. § 501.211, based on these defendants' alleged aggressive marketing and acceptance of customer deposits for travel and for continuing to accept services from trade vendors when, given the financial condition of the company, the Defendants knew or should have known that the customers would never travel and the vendors would never get paid. (Opp'n

to Motion to Dismiss, DE 54 at p. 6). According to Plaintiff, customers and vendors were deceived by, and acted to their detriment because of, the Defendants' concealment of their knowledge that when Far & Wide accepted customers' deposits and travel services from vendors, these customers would never travel and these vendors would never be paid. (*Id.*). Plaintiff further alleges that these customers and vendors made the deposits and provided the travel services at their peril. As a result, Far & Wide incurred additional liabilities of between $30 to $50 million between January and September 2003, and Far & Wide cannot pay this additional liability. (*Id.*). Defendants argue that the FDUTPA claim must be dismissed because Plaintiff has failed to establish the required element of damage to Far & Wide, and that, in addition, Plaintiff is barred from bringing the claim under the doctrine of *in pari delicto*.

Plaintiff responds that the incurrence of debt to be repaid as a direct and proximate cause of the wrongful conduct, coupled with the Defendants' knowledge that the debt would never be repaid, sufficiently establishes the element of damages under FDUTPA. Plaintiff further argues that because he is a trustee asserting FDUTPA claims which serve the strong remedial public policy purposes of the State of Florida, the doctrine does not apply. As discussed below, I conclude that the FDUTPA claim must be dismissed with prejudice because the incurrence of debt by a corporation in an attempt to continue its operation is not a recognized harm under the statute.

Further, the *in pari delicto* doctrine prevents Far & Wide from recovering damages from its own wrongdoing.

1. Actual Damages

To assert a claim under FDUTPA, the plaintiff must allege: (1) a deceptive act or unfair practice; (2) causation; and, (3) actual damages. *KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1073 (Fla. 5th DCA 2008).[5] The third element is required by § 501.211, Florida Statutes, which provides that "[i]n any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105." Fla. Stat. § 501.211. It is well-settled in Florida that actual damages under FDUTPA consists of "the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties. [. . .] A notable exception to the rule may exist when the product is rendered valueless as a result of the defect – then the purchase price is the appropriate measure of

[5] While Defendants do not concede that the first two elements have been established, their argument is based solely on the contention that Plaintiff has not pled actual damages to Far & Wide Because the failure to plead any one of the three elements is dispositive, this Order only addresses the element of actual damages.

actual damages." *Rollins, Inc. v. Butland* [sic], 951 So. 2d 860, 869 (Fla. 2d DCA 2006) (quoting *Rollins, Inc. v. Heller,* 454 So. 2d 580, 585 (Fla. 3d DCA 1984)). Actual damages do not include consequential damages. *Id.* (citing *Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati,* 715 So. 2d 311, 314 (Fla. 4th DCA 1998)); *Urling v. Helms Exterminators, Inc.,* 468 So. 2d 451, 454 (Fla. 1st DCA 1985) (holding that FDUTPA allows recovery for diminished value of goods received but does not authorize recovery of special or consequential damages). Plaintiff argues that following the 2001 legislative amendment to FDUTPA, the general damages standard stated above is not applicable for a loss suffered by persons other than the consumer. However, cases decided after the 2001 amendment, including the case Plaintiff relies on, continue to apply this standard. *See Rutland,* 951 So. 2d at 869 (decided in 2006). Moreover, which standard to apply need only be determined if Plaintiff satisfies the threshold issue of sufficiently pleading actual damages.

The 2001 amendment has been interpreted to broaden the class of plaintiffs that may bring an FDUTPA claim for damages. *See Niles Audio Corp. v. OEM Systems Co., Inc.,* 174 F. Supp.2d 1315, 1319 (S.D. Fla. 2001). The prior language of the statute provided that "[i]n any individual action brought by a *consumer* who has suffered a loss as a result of a violation of this part, such *consumer* may recover actual damages." *Id.* By replacing the word "consumer" with "person", the legislature intended "to allow a

broader base of complainants, including competitors . . . , to seek damages." *Id.* at 1320. While the amended language envisions a broader class of plaintiffs, the requirement that the plaintiff must have suffered actual damages has not changed.

In this case, the Amended Complaint does not plead actual damages suffered by Far & Wide. The damage to the consumers – i.e. not being able to take the vacations they paid for – and the damage to the creditors – i.e. not being paid for the travel services they provided – do not give raise [sic] to a cause of action by Far & Wide. The Amended Complaint must plead actual damages suffered directly by Far & Wide to avoid dismissal, but the Amended Complaint has failed to do so.

Mukamal argues that the additional $30-50 million incurred by Far & Wide qualifies as actual damages under the statute. Mukamal is asking the Court to conclude that Far & Wide was damaged by accepting payment and travel services it needed to continue its business. However, Mukamal has not provided any authority for his novel argument, and my independent review has not uncovered any case law on point. Nothing in the text of the statute or the case law allows for such a broad interpretation of the damages requirement. Therefore, because Mukamal has failed to adequately plead actual damages incurred by Far & Wide as a result of the allegedly deceptive trade practice, the FDUTPA claim must be dismissed with prejudice. *Cf. Army Aviation Heritage Found. & Museum, Inc. v. Buis,* 504 F. Supp. 2d 1254,

1270 (N.D. Fla. 2007) ("[I]n the absence of actual damages attributable to a FDUTPA violation, Plaintiff's claim must be dismissed.").

2. *In Pari Delicto*[6]

In pari delicto is both an affirmative defense and an equitable defense which, "[b]roadly speaking, . . . prohibits plaintiffs from recovering damages resulting from their own wrongdoing." *O'Halloran v. PricewaterhouseCoopers LLP,* 969 So. 2d 1039, 1044 (Fla. 2d DCA 2007) (quoting *Nisselson v. Lernout,* 469 F.3d 143, 151 (1st Cir. 2006)); *see also Hall v. Hall*, 112 So. 622, 628 (Fla. 1927) (referring to "the universal rule of our law that one in a court of justice cannot complain . . . of another's wrong whereof he was a partaker") (quoting Bishop, Marriage and Divorce, § 1548). The premises for the defense are twofold. First, "courts should not lend their good offices to mediating disputes among wrongdoers." *Id.* Second, "denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Id.* In certain circumstances, "[a]pplication of the doctrine may yield to public policy considerations . . . ; since the principle is founded on public policy, it may give way to a supervening public policy." *O'Halloran,* 969 So. 2d at 1044, n. 4 (quoting *Kulla v. E.F. Hutton &*

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[6] Although my conclusion that the Amended Complaint has failed to plead the required element of damages is dispositive as to the FDUTPA claim, I will discuss the application of the *in pari delicto* doctrine.

Co., 426 So. 2d 1055, 1057 n.1 (Fla. 3d DCA 1983)). A complaint is properly dismissed where the allegations on the face of the complaint make clear that the doctrine applies. *See Edwards,* 437 F.3d at 1156.

The Eleventh Circuit and Florida Courts have applied the *in pari delicto* doctrine against a bankruptcy trustee. *See, e.g., Official Comm. of Unsecured Creditros* [sic] *PSA, Inc. v. Edwards,* 437 F.3d 1145, 1150 (11th Cir. 2006) (applying the *in pari delicto* doctrine against a bankruptcy trustee asserting a violation of the federal RICO statute); *O'Halloran,* 969 So. 2d at 1044-45 (ruling that the *in pari delicto* doctrine applies where the agent's misconduct is imputed to the corporation.). The reason is that a [sic] "a bankruptcy trustee stands in the shoes of the debtor." *O'Halloran,* 969 So. 2d at 1046 (quoting *Edwards,* 437 F.3d at 1150). Therefore, if a claim of the debtor would have been subject to the *in pari delicto* defense at the commencement of the bankruptcy, then the claim, when asserted by the trustee, is subject to the same defense. *Id.*

In *O'Halloran,* the District Court of Appeal of Florida, Second District, explained that "[w]here the defense of *in pari delicto* is asserted against a corporate entity based on the misconduct of the corporation's agents, it must be determined whether the misconduct of those agents is properly imputed to the corporation." 969 So. 2d at 1044. Generally, the corporation is liable for the acts of its directors and officers. *See id.* at 1045. However, if the directors and officers act adversely to the corporation's interests,

the knowledge and misconduct of the directors and officers is not imputed to the entity. *Id.* This exception to the general rule is known as the "adverse interest exception." *Id.* The adverse interest exception is not available where a corporation is "wholly dominated by persons engaged in the wrongdoing [because] the corporation has itself become the instrument of wrongdoing." *Id.* Therefore, "when there is no innocent member of management who could act to thwart the wrongdoing," the adverse interest exception is not available and the wrongdoing is imputed to the corporation. *Id.* By way of example, the *O'Halloran* court compared a corporation whose primary existence was as a perpetrator of a Ponzi scheme, which cannot be said to have suffered an injury, and a corporation which is itself the victim of looting by its agents. *Id.*

In Florida, the application of the doctrine turns on whether the corporation benefitted from the alleged misconduct. *Id.* If the actions of the directors and officers are intended to benefit the corporation, or if the actions actually cause a short- or long-term benefit, the exception does not apply. *See Beck v. Deloitte & Touche,* 144 F.3d 732, 736 (11th Cir. 1998) (applying Florida law). "Under Florida law, the knowledge of a corporate officer whose fraud or misbehavior brings short-term gain to the corporation, or merely injures a third party, is imputed to the corporation, even if the officer's misbehavior ultimately causes the corporation's insolvency." *Id.* (citing

Seidman & Seidman v. Gee, 625 So. 2d 1, 2-3 (Fla. 3d DCA 1992) (per curiam)).

Whether *in pari delicto* can be applied to an FDUTPA claim seems to be a question of first impression in Florida. As a court sitting in diversity, my "objective is to determine the issues of state law as [I] believe the Florida Supreme Court would." *State Farm Fire and Cas. Co. v. Steinberg*, 393 F.3d 1226, 1231 (11th Cir. 2004) (citing *CSX Transp., Inc. v. Trism Specialized Carriers, Inc*, 182 F.3d 788, 790 (11th Cir.1999); *Fioretti v. Massachusetts General Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir.1995)). "In the absence of definitive guidance from the Florida Supreme Court, we follow relevant decisions of Florida's intermediate appellate courts." *Id.* Where there are no precedents from Florida's intermediate appellate courts, "we may consider the case law of other jurisdictions that have examined similar policy provisions." *Id.* In light of the similarities between FDUTPA and other states' laws on deceptive and unfair trade practices, as well as considering Florida courts' decisions on the *in pari delicto* doctrine, I conclude that the Florida Supreme Court would follow these precedents under FDUTPA as well.

In *Baena v. KPMG LLP*, 453 F.3d 1 (1st Cir. 2006), for example, the First Circuit applied the Massachusetts analogue to FDTUPA [sic] and, in applying the doctrine to affirm dismissal of claim [sic] for unfair and deceptive trade practices, stated:

> A corporation is a legal entity managed by a board and officers, represented by agents, and owned by stockholders. The question of just whose actions should be imputed to the [sic] "the corporation," and what exceptions should exist to such imputation, arises naturally in applying the *in pari delicto* doctrine, as in many other contexts. . . . In this case, the trustee himself asserts that the chairman of the board, the CEO and the managing director were all knowing parties. The approval and oversight of such statements is an ordinary function of management that is done on the company's behalf, which is typically enough to attribute management's actions to the company itself.

Id. at 7. The court thus rejected the trustee's argument that the *in pari delicto* doctrine should not apply under the adverse interest exception and the notion that the doctrine should not apply where "innocent decision-makers" could have prevented the harm. In so doing, the court noted that where top management overstated the corporations' earnings to facilitate stock sales or acquisitions, while not an interest of the company in the long-term, it profits the company in the first instance. *Id.* The court also ruled that the fact that the implicated managers also benefitted does not make the interests of the managers adverse to those of the corporation. *Id.* at 7-8.

In this case, if the alleged misconduct of the Defendants is imputed to Far & Wide, the FDUTPA claim is barred by the *in pari delicto* doctrine. Under

Florida law, the question of imputation turns on the adverse interest exception. Under the facts of this case as alleged in the Amended Complaint, the exception does not apply. First, the Amended Complaint alleges that the directors and officers of Far & Wide, including the two individuals who held the position of CEO/President during the relevant times, its CFO and other managers, knowingly and intentionally participated in the alleged misconduct. Therefore, Far & Wide was a direct participant in the unfair and deceptive trade practices which resulted in accruals to Far & Wide. Where, as here, "there is no innocent member of management who could act to thwart the wrongdoing," the adverse interest exception is not available and the wrongdoing is imputed to the corporation. *Cf. O'Halloran,* 969 So. 2d at 1045.

Second, the allegations in the Amended Complaint demonstrate that Defendants' actions bestowed benefits to the corporation by allowing it to continue collecting payments from customers and obtaining services from vendors thereby eliminating any possible application of the adverse interest exception. *Cf. Beck,* 144 F.3d at 736 ("Florida law requires that a corporate officer's interest be entirely adverse for the exception to apply (i.e., his actions must neither be intended to benefit the corporation nor actually cause short- or long-term benefit to the corporation)."). Since the adverse interest exception does not apply, the alleged misconduct of Far & Wide's former officers and directors is imputed to the corporation. Mukamal, as trustee, stands in the shoes of Far &

Wide and is precluded by the doctrine of *in pari delicto* from bringing an FDUTPA claim against Defendants. Because there are no set of facts that Plaintiff may allege to cure this deficiency, the FDUTPA claim is dismissed with prejudice. *See, e.g., Case v. Riley,* Case No. 07-11489, 2008 U.S. App. LEXIS 6434, **3-4 (11th Cir. Mar. 25, 2008) (per curiam) ("Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice, unless . . . a more carefully drafted complaint could not state a valid claim.") (internal quotations omitted).

b. Breach of Fiduciary Duty of Loyalty and Related Aiding and Abetting Claims (Counts VIII, IX and X)

In dismissing the disloyalty claims in the original complaint, I stated that Plaintiff had failed to state a claim because the focus of his allegations revolved around breaches of duties purportedly owed to the creditors of Far & Wide. (Nov. 2 Order at p. 37). I noted that to survive dismissal of a claim for breach of fiduciary duty, Plaintiff must allege the violation of duties owed to Far & Wide itself or to its minority shareholders.[7] (*Id.*). Further, I stated that, of significance, the original complaint was silent as to who

[7] As discussed in section III A of this Order, Delaware law applies to these claims

constitutes the minority shareholders and how the majority shareholder's actions breached the duty of loyalty to them. For example, the original complaint did not allege that the interests of the Wellspring defendant were favored over those of other shareholders, or that Individual Defendants' decision-making failed to increase the value of Far & Wide's equity as to **all** shareholders. Finally, I observed that the original complaint did not even allege that the Debtors suffered any loss on the loan transactions in questions. In dismissing these claims without prejudice, I cautioned plaintiff that the claims of breaches of the duty of loyalty had to be pled with more particularity, should not be commingled with allegations of bad faith claims, and should include individualized allegations as to each of the defendants rather than referring to them collectively. Mukamal has attempted to cure some of these deficiencies in his Amended Complaint.

Mukamal argues that the Amended Complaint has sufficiently pled disloyalty claims arising out [sic] the Defendants' desire to sell the company and pursuing that desire to the exclusion of taking other value-creating or value-preserving measures. He further alleges that the Defendants' pursuit of the sale of the entity to the exclusion of other more appropriate measures designed to preserve value led to the entering of a secured transaction with Wellspring in October 2002. He argues that by becoming a secured creditor, Wellspring was treated preferably over other shareholders. In addition, he states that since the

Defendants were interested insider directors, the Defendants are not entitled to the protection of the business judgment rule and must instead prove that the 2002 loan transaction was "entirely fair."

Despite Plaintiff's allegations that the Defendants were not disinterested directors or independent in their decision making, Plaintiff once again fails to meet the threshold requirement that the challenged transaction harmed Far & Wide. Instead, the allegations in the Amended Complaint continue to be focused on claimed breaches of the duty of loyalty owed to Far & Wide's creditors and not to the entity itself or its minority shareholders. Mukamal's attempt to include conclusory allegations that the Defendants' conduct "was at the expense of and to the detriment of the Far & Wide corporate entity and its assets", does not "nudged [sic] [his] claims across the line from conceivable to plausible," *Bell Atl.*, 127 S. Ct. at 1974, as is required to survive a motion to dismiss. The Amended Complaint continues to be devoid of any allegation that the interests of the majority shareholders were favored over those of the minority shareholders; it also does not allege that the Individual Defendants' decision-making failed to increase the value of **all** shareholders, not just that of the majority shareholders or the inside directors. Instead, the Amended Complaint alleges that the Individual Defendants were operating Far & Wide with the goal of generating a return for all shareholders alike. In essence, the Amended Complaint is alleging that the Defendants placed the interests of

the shareholders above those the creditors. This is fatal to Plaintiff's claims since the duty of loyalty required the Defendants to favor the entity and shareholders over the creditors as they did.

The Amended Complaint also alleges an improper prolongation of Far & Wide's operations which resulted in Far & Wide's inability to pay its creditors and led to thousands of customers being stranded or unable to take pre-paid trips. Neither of these alleged breaches are sufficient to support a claim of breach of duty of loyalty to the entity or its minority shareholders. As explained in the Nov. 2 Order, "Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate. Even when the company is insolvent, the board may pursue, in good faith, strategies to maximize the value of the firm." *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.,* 906 A.2d 168, 203 (Del. Ch. 2006). Similarly, Plaintiff does not explain how the decision to acquire additional loans or to extend the maturity date on the existing loans harmed the entity or the minority shareholders. Instead, Plaintiff concedes that these actions were taken in an attempt to prevent Far & Wide from entering bankruptcy and to sell Far & Wide for a profit – a sale that would have benefitted **all** shareholders. As I have previously stated, "the mere act of incurring additional debt in the face of insolvency, alone, does not establish bad faith or disloyalty if the purpose was to maximize the value of the firm as to all shareholders." (Nov. 2 Order at p. 38).

As to the alleged conflicts-of-interest, the allegations are premised on a divergence of interests as between the Defendants and Far & Wide's creditors, not between Defendants and the entity or its minority shareholders. *Gheewalla* rejects the purported existence of a duty to creditors "[w]hen a solvent corporation is navigating in the zone of insolvency . . . [since] the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders," *Gheewalla*, 930 A.2d at 10; Nov. 2 Order at p. 28, n. 24. Likewise, while Plaintiff alleges that Wellspring, the majority shareholder, received a secured loan, there are no allegations that minority shareholders unsuccessfully sought to receive this loan, or that the entity could have received an unsecured or secured loan at better terms. The Amended Complaint still does not explain how accruing additional debt in October 2002 harmed Far & Wide or how Debtors suffered any loss from the loan transactions. At best, the secured loan damaged existing creditors as it favored one creditor over another, but the transaction did not damage the entity or its minority shareholders. Finally, the new FDUTPA claim alleges harm only to the customers and vendors, not to Far & Wide or its minority shareholders. In sum, the disloyalty and related aiding and abetting claims fail because Plaintiff has not plead a duty owed to Far & Wide or its minority shareholders. Because the Amended Complaint fails to adequately allege the threshold requirement that the Defendants' actions harmed Far & Wide and its minority shareholders or

that they enriched Defendants, Counts VIII, IX, and X, consisting of the disloyalty claims, must be dismissed with prejudice.[8]

c. Breach of Fiduciary Duty of Care Claims (Counts XI and XII)

I dismissed the duty of care claims in the Original Complaint because of the inadequacy of "lumping together" all of the Individual Defendants. (*See* Nov. 2 Order at pp. 40-41). In the current Motion to Dismiss, Defendants argue that these claims must be dismissed because the Amended Complaint still fails to make any individualized allegations against Bakes, Gremse, McKey or Toll. Plaintiff responds that the Amended Complaint sufficiently alleges that Bakes, McKey, Toll and Gremse refused to acknowledge, let alone implement, the expert advice of KPMG since the heightened pleading requirements of Rule 9(b) are inapplicable to this case. However, Plaintiff's discussion of Rule 9(b) is beside the point because Defendants do not argue that the Amended Complaint is

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[8] Plaintiff has already been given an opportunity to amend the complaint; since the amended complaint continues to fail to allege a valid cause of action, I dismiss these claims with prejudice *See Case v. Riley*, Case No 07-11489, 2008 U S App. LEXIS 6434, **3-4 (11th Cir Mar 25, 2008) (per curiam) ("Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice, unless . a more carefully drafted complaint could not state a valid claim ") (internal quotations omitted)

subject to heightened pleading requirements of fraud. Instead, Defendants note that Plaintiff has failed to correct the pleading deficiencies that resulted in the dismissal of these claims from the Original Complaint. Plaintiff attempts to save its insufficient allegations through explanatory statements in its opposition papers, including: (1) "When all defendants are mentioned, the action is the product of action by both officers and directors." (Response, DE 54 at p. 16); (2) "When Defendants Bakes, Toll, Gremse, and McKey are mentioned together, they are acting in their capacity as officers." (*Id.*); (3) " . . . it is clear that when Defendants Toll and Gremse are mentioned, they are acting in their sole capacities as officers." (*Id.*); and, (4) "Likewise, when Defendants Bakes, McKey, Stanton, Mariano, Feldman and Fortin are mentioned, they are acting in their collective capacity as board of directors." (*Id.*). Plaintiff adds that it is "not uncommon for officers and directors to take action collectively." (*Id.*). None of these explanations, however, are found in the Amended Complaint. Instead, the Amended Complaint continues to lump the Defendants together.

Even if the allegations were sufficiently pled, the duty of care claims must be dismissed for failure to state a cause of action. A duty of care claim must be premised on allegations that the board failed to exercise informed decisions. *See, Smith v. Van Gorkom,* 488 A.2d 858, 872-873 (Del. 1985) ("[A] director's duty to exercise an informed business judgment is the nature of a duty of care, as distinguished from a duty

of loyalty."). Defendants argue that a due care claim cannot be premised on a director's decision not to implement the recommendations of experts they had retained. In response, Plaintiff argues that *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) and *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993) recognize a due care violation where fiduciaries fail to follow expert's advice as pled in the Amended Complaint. Plaintiff has misinterpreted *Brehm* and *Cede*.

In *Brehm*, the court discussed "whether the directors are to be 'fully protected' (i.e., not held liable) on the basis that they relied in good faith on a qualified expert." *Brehm*, 746 A.2d at 261. Thus, the question was not whether the duty of care was breached when a director did not rely on experts' advice, as is alleged here, but whether relying on faulty advice can lead to liability. In *Cede*, the court stated that the duty of care is breached when a director makes an uninformed decision. *Cede*, 634 A.2d at 367. There is no discussion as to whether a director can be liable for his failure to implement advice given by a retained expert. Additionally, I agree with Defendants that basing liability on a director's failure to implement expert advice would result in boards choosing not to engage experts due to the resulting risk of litigation if the board's business judgment is diverged from the experts' recommendations.

Recently, the Delaware Court of Chancery rejected Plaintiff's argument that failure to follow experts' advise can form the basis of a duty of care

claim. In *Gantler v. Stephens,* No. 2392, 2008 Del. Ch. LEXIS 20 (Del. Ch. Feb. 14, 2008), the plaintiffs alleged that the defendants had breached their duties of care as directors and officers when they, among other things, rejected an offer to buy the company and terminated the sales process in order to preserve their positions as directors and officers. According to the plaintiffs, because of the defendants' alleged breach, the plaintiffs were not able to receive a value-maximizing bid for their stock. The court dismissed the breach of duty of care breach [sic] because the complaint specifically indicated that the board received expert advice and deliberated; "[t]he fact the Board ultimately rejected an offer its Financial Advisor considered fair does not support an inference of misconduct . . . Plaintiffs' claim merely attempts to convert what might be a duty of care claim (e.g., the Directors were negligent in not conducting a more fulsome discussion of the First Place proposal) into a disclosure claim." *Id.* at *76.

Here, Mukamal does not allege that the board made an uninformed decision with regards to the additional loans and its decision not to seek bankruptcy protection. Thus, Mukamal has not properly pled a duty of care violation. Further, the Amended Complaint concedes that the Defendants hired KPMG to inform its decision. Therefore, any amendment to the claim would be futile: the hiring of an expert refutes any inference that the board was uninformed. As in *Gantler,* the fact the Defendants ultimately rejected KPMG's advice does not support an inference

of misconduct. *Cf. id.* For these reasons, Counts XI and XII must be dismissed with prejudice. *See supra*, n. 7.

C. Bankruptcy Claims: Equitable Subordination, Disallowance of Claim, and Recharacterization of Purported Debt Claims (Counts XIII-XVI)

Defendants Feldman, Fortin, Mariano and Stanton request dismissal with prejudice of Count XIII against them because none of them have ever filed individual proofs of claim in the pending bankruptcy. For the same reason, Defendant Wellspring requests that Counts XIV through XVI against it be dismissed with prejudice. Plaintiff concedes that these Defendants have not filed individual claims and that these claims, as pled against these particular defendants, must be dismissed with prejudice. These claims, however, remain as plead against defendants Loan Capital Funding, LLC ("LCF"), Bakes, McKey, Toll, and Gremse.[9]

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[9] I have not determined the merits or sufficiency of these claims as against these defendants. Rather, these claims remain viable because they were not addressed in the Motion to Dismiss.

IV. [sic] Conclusion

For the reasons discussed above, it is hereby ORDERED AND ADJUDGED:

1. Counts II, IV, and VI of the Original Complaint [DE 1] are DISMISSED WITH PREJUDICE.

2. Defendants' Motion to Dismiss Counts I through XIV of the Amended Complaint with Prejudice [DE 48] is GRANTED.

3. Counts I, III, IV, V, VI and VII (derivative creditors' claims) are DISMISSED WITH PREJUDICE.

4. The FDUTPA Claim, Count II, is DISMISSED WITH PREJUDICE.

5. The duty of loyalty claims, Counts VIII-X, are DISMISSED WITH PREJUDICE.

6. The duty of care claims, Counts XI and XII, are DISMISSED WITH PREJUDICE.

7. The Bankruptcy Claims, Counts XIII-XVI, as pled against Feldman, Fortin, Mariano, Stanton and Wellspring, are DISMISSED WITH PREJUDICE.

8. The Clerk of Court is instructed to TERMINATE the following Defendants from this action: (1) Wellspring Capital Management LLC; (2) Carl M. Stanton; (3) Greg S. Feldman; (4) David C. Mariano; and, (5) Jason B. Fortin.

9. The parties are instructed to file a joint status report within ten (10) days from the date of this Order advising the Court of the status of Counts XIII-XVI as pled against Defendants Loan Capital Funding, LLC., Bakes, McKey, Toll and Gremse, and of the parties' intent to proceed on these claims.

10. DONE AND ORDERED in Chambers at Miami, Florida, on this 19 day of May, 2008.

/s/ Alan S. Gold
THE HONORABLE
ALAN S. GOLD
U.S. DISTRICT JUDGE

cc:
U.S. Magistrate Judge Chris M. McAliley
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-14346-HH

BARRY E. MUKAMAL,
as Liquidating Trustee and
Director and Officer Trustee
of Far & Wide Corporation, et al.,

Plaintiff-Appellant,

versus

PHIL BAKES,
ANDREW C. MCKEY,
CRAIG TOLL,
GEORGE GREMSE,
LOAN CAPITAL FUNDING, LLC, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Oct. 21, 2010)

Before EDMONDSON and PRYOR,* Circuit Judges.

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* This opinion is being entered by quorum pursuant to 28 U.S.C. § 46(d).

PER CURIAM:

The petition for rehearing filed by the Appellant is DENIED.

/s/ J L Edmondson
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-CIV-20793-GOLD/TURNOFF

BARRY E. MUKAMAL, AS LIQUIDATING TRUSTEE AND DIRECTOR AND OFFICER TRUSTEE OF FAR & WIDE CORP., ET AL.,

Plaintiffs,

v.

PHIL BAKES, ANDREW C. McKEY, CRAIG TOLL, GEORGE GREMSE, WELLSPRING CAPITAL MANAGEMENT LLC, LOAN CAPITAL FUNDING LLC, CARL M. STANTON, GREG S. FELDMAN, DAVID C. MARIANO, and JASON B. FORTIN,

Defendants. /

AMENDED COMPLAINT

Introduction

1. Plaintiff, Barry E. Mukamal, is the Liquidating Trustee (the "Liquidating Trustee") and Directors and Officers Trustee (the "D&O Trustee") of the Liquidating Trust (the "Liquidating Trust") and the Directors & Officers Trust (the "D&O Trust"), respectively, of Far & Wide Corporation, Far & Wide Travel Corporation, Adventure Center, Inc., African Travel, Inc., Far & Wide International, Inc., and Travel

Media Services Corp. (collectively, "Far & Wide"), who was appointed pursuant to the Third Amended Joint Liquidating Plan of Reorganization of Far & Wide confirmed on December 19, 2005 in *In re: Far & Wide Corporation, et al.*, Case No. 03-40415-BKC-RAM (the "Plan"), attached hereto as *Exhibit A. See also In re: Far & Wide Corporation, et al.*, Case No. 03-40415-BKC-RAM, Order Confirming Third Amended Joint Liquidating Plan of Reorganization of Far & Wide Corporation, *et al.*, dated December 19, 2005 (the "Confirmation Order"), at ¶11, attached hereto as *Exhibit B.*

2. Plaintiff brings direct claims on behalf of the Far & Wide corporate entity (also referred to as the "Debtor") and, in the alternative, derivatively on behalf of all creditors of the estate of the Far & Wide corporate entity.

3. Plaintiff's claims are asserted against the former officers and directors of Far & Wide, namely, Defendants Phil Bakes ("Bakes"), Andrew C. McKey ("McKey"), Craig Toll ("Toll"), George Gremse ("Gremse"), Carl M. Stanton ("Stanton"), Greg S. Feldman ("Feldman"), David C. Mariano ("Mariano"), and Jason B. Fortin ("Fortin") and against Far & Wide's controlling shareholders, Wellspring Capital Management LLC ("Wellspring") and Loan Capital Funding LLC ("LCF").

4. Far & Wide was a travel services company that petitioned for bankruptcy protection in September 2003. As set forth more fully below:

a. Between April 2002 and September 2003, Far & Wide was insolvent. As a consequence of its insolvency, Far & Wide's creditors were the residual claimants of the assets owned by the Far & Wide corporate entity.

b. While Far & Wide was insolvent, Far & Wide's directors breached their fiduciary duties of loyalty to the Far & Wide corporate entity by mismanaging Far & Wide for their own person [sic] benefit and for the benefit of Wellspring and LCF, Far & Wide's controlling shareholders, at the expense of the interests of the Far & Wide corporate entity.

c. For example, the defendants engaged in a self-dealing loan transaction with Wellspring, and a related transaction with Ableco Finance, LLC, in October 2002. Far & Wide's directors and officers further breached their fiduciary duty of loyalty by extending the maturity of the Ablleco [sic] loan in July 2003. Neither the decision to enter into, nor the negotiation of the terms of these transactions were approved by a majority of disinterested or independent directors, nor were these transactions approved by Far & Wide's minority shareholders.

d. The decisions to enter into the October 2002 transactions and the July 2003 extension were motivated by Wellspring's interest, and the interest of two of Far & Wide's insider directors, Bakes and McKey, in selling Far & Wide to an outside investor

for a substantial return on their investments. The consequence of entering into the October 2002 transaction and the July 2003 extension was the continuance of Far & Wide's operations when Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the travel industry generally demanded a reorganization of Far & Wide in order to preserve the value of Far & Wide's assets for the benefit of its creditors. These decisions caused the Far & Wide entity to continue operations outside of bankruptcy protection thereby causing the further diminution in the value of Far & Wide's assets to a point where Far & Wide did not have any ability to pay its liabilities to its creditors when the bankruptcy petition was finally filed in September 2003. As a result, the October 2002 transaction and July 2003 extension were not fair to the Far & Wide corporate entity.

e. The decisions to enter into the October 2002 transactions and the July 2003 extension were not in good faith as they were not in the interests of the Far & Wide corporate entity as they were in conscious disregard of the duty to maximize the value of the assets owned by the Far & Wide corporate entity and were motivated by advancing the interests of Far & Wide's controlling shareholder, Wellspring, at the expense of and to the detriment to the value of Far & Wide's assets.

f. Beginning in March 2002 and thereafter, Far & Wide's officers breached their duty of due care to the Far & Wide corporate entity by failing or refusing to act on an informed basis because they failed or refused to follow expert advice rendered by Far & Wide's consultants, KPMG Advisory Services ("KPMG") and The Recovery Group ("TRG"). The advice provided by KPMG and TRG sought to preserve and maximize the value of the assets owned by the Far & Wide corporate entity during the critical period of Far & Wide's insolvency. The failure or refusal to follow this advice resulted in the diminution of the value of Far & Wide's assets to a point where Far & Wide did not have any ability to pay its liabilities to its creditors when bankruptcy protection was finally sought in September 2003.

g. The failure or refusal of Far & Wide's officers to act on their consultants' advice was not in good faith as it did not further the best interests of the Far & Wide corporate entity as it was in conscious disregard of the duty to maximize the value of the assets owned by the Far & Wide corporate entity and was motivated by advancing the interests of Far & Wide's controlling shareholders, Wellspring and LCF, and the interests of Far & Wide's insider directors, Bakes and McKey, at the expense of and to the detriment to the value of Far & Wide's assets.

h. The breaches of the fiduciary duty of loyalty owed by Far & Wide's directors and officers to the Far & Wide corporate entity were committed with the knowing and substantial assistance of Wellspring and LCF, for whose benefit these breaches were committed.

i. The breaches of the fiduciary duty of due care owed by Far & Wide's officers to the Far & Wide corporate entity were similarly committed with the knowing and substantial assistance of Far & Wide's directors, and the knowing and substantial assistance of Wellspring and LCF, for whose benefit these breaches were committed.

j. As a result of these breaches of fiduciary duty, the value of the assets owned by the Far & Wide corporate entity diminished, such that it could not pay Far & Wide's creditors the more than $150 million they were owed as of September 2003, the bankruptcy petition date.

k. From January through September 2003, Far & Wide's officers and directors also caused Far & Wide to aggressively market and sell trips to Far & Wide customers and accept customer deposits when they knew or should have known that it was probable that Far & Wide's customers would never travel.

l. From January through September 2003, Far & Wide's officers and directors caused Far & Wide to accept the services of Far & Wide's vendors when they knew or

should have known that it was probable that Far & Wide's vendors would never be paid for the goods and services rendered.

m. These practices were deceptive and unfair and in violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").

n. For the breaches and violations outlined above and described more fully below, Plaintiff seeks damages of approximately $150 million for the Far & Wide corporate entity, in addition to declaratory relief equitably subordinating, recharacterizing and/or disallowing certain of the Defendants' claims against Far & Wide in the related bankruptcy proceeding. Plaintiff demands a jury trial on all claims and issues of right.

PARTIES

Barry E. Mukamal

5. Barry E. Mukamal, is a citizen and resident of the State of Florida.

6. Plaintiff brings this action in his dual capacities as the Liquidating Trustee and as the D&O Trustee of Far & Wide, as appointed pursuant to the Plan.

7. Pursuant to the Plan as well as the trust agreements created thereunder, Plaintiff is empowered as both the Liquidating Trustee and the D&O Trustee to bring claims against the former directors

and officers of Far & Wide directly on behalf of the Far & Wide corporate entity and derivatively on behalf of all of Far & Wide's creditors. *See* Plan at Article VI, § 6.8(f); *id.* at Article X, § 10.4 (and the Liquidating Trust Agreement and the Directors' and Officers' Trust Agreement incorporated in the Plan); Confirmation Order at ¶¶ 14-17.[1]

8. Prior to their bankruptcy filing, Far & Wide Corporation and Far & Wide Travel Corporation existed only as holding companies for the entire Far & Wide enterprise.

9. Adventure Center, Inc., African Travel, Inc., Far & Wide International, Inc., and Travel Media Services Corp. constituted the active, operational part of the Far & Wide enterprise.

10. The United States Bankruptcy Court for the Southern District of Florida substantively consolidated all of these entities through the Confirmation Order. *See* Confirmation Order at ¶ 9.

11. Thus, all of the entities must be treated as a single, combined entity for the purposes of this action.

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[1] Pursuant the Court's Order on Defendants' Motions to Dismiss, dated November 2, 2007 [D E. 40], the Court dismissed with prejudice all direct claims alleged by Plaintiff in the original Complaint on behalf of creditors who assigned their claims to Plaintiff pursuant to the Plan. Accordingly, Plaintiff brings derivative claims on behalf of all the creditors in this action.

12. On September 23, 2003, Far & Wide filed a voluntary petition seeking relief under Title 11, United States Code, Chapter 11. *See* 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code").

13. Far & Wide continued operating its businesses as a debtor-in-possession until the appointment of a Chapter 11 Trustee on September 6, 2005.

14. Plaintiff was appointed to be the Liquidating Trustee and the D&O Trustee upon entry of the Confirmation Order on December 19, 2005.

15. Pursuant to the Plan, all creditors who affirmatively voted to approve the Plan, legally, knowingly, specifically, and intentionally assigned their claims against the Defendants to the D&O Trust to be brought by Plaintiff as the D&O Trustee.

16. Pursuant to the Plan, Plaintiff, as D&O Trustee, was also authorized to investigate, prosecute and, if necessary, litigate the Debtors' D&O Claims.[2]

17. Pursuant to the Plan, Plaintiff was also authorized to have standing as a representative of the beneficiaries of the D&O Trust to pursue any and all appropriate causes of action necessary to monetize the Debtors' D&O Claims and the Creditor D&O Claims.

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[2] Defined terms not defined herein shall have the same definition as contained in the Plan.

18. Pursuant to the Plan, all other causes of action of the Debtors were vested in the Liquidating Trust to be prosecuted by Plaintiff as Liquidating Trustee.

19. Accordingly, pursuant to the Plan, the Debtors' and Creditors' claims against the Defendants were transferred to and vested in the D&O Trust.

Phil Bakes

20. Defendant Bakes is a citizen and resident of the State of Florida.

21. At all times material to the allegations set forth herein, Bakes was President and/or Chief Executive Officer of Far & Wide and a member and Chairman of Far & Wide's board of directors and/or one or more executive committees of Far & Wide's board of directors.

22. As a result of his participation in the formation of Far & Wide, at all times material to the allegations set forth herein, Bakes held approximately 8.7% of Far & Wide's outstanding stock.

23. As CEO and/or President of Far & Wide, Bakes had the duties and authority that were customarily exercised by such officers of a business corporation of a similar size and stature consistent with his positions and as determined from time to time by Far & Wide's board of directors. He was paid an annual salary of approximately $400,000 plus up

to $200,000 per year in bonus. Bake's compensation was material to him.

24. As CEO, Bakes had overall responsibility for the operation of Far & Wide by working with Gremse, Toll, McKey and other executive staff to set Far & Wide's goals and arrange for the implementation of programs to attain these goals. Bakes also appointed department heads and managers who directed Far & Wide's employees to implement Far & Wide's business plans and programs.

25. Bakes was also responsible for overseeing Far & Wide's budgets and ensuring that its resources were used properly and that Far & Wide's programs were carried out as planned.

26. As CEO, President and Director, Bakes controlled and participated in the policies, operations and business of Far & Wide.

27. Bakes is subject to the jurisdiction of this Court in his individual capacity due to his residency in the State of Florida.

28. Alternatively, Bakes is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(b) because Bakes committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

29. Alternatively, Bakes is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(f) because Bakes caused injury to persons and property within the

State of Florida while engaged in solicitation or service activities within the State of Florida, from which injuries this cause of action arises.

30. Alternatively, Bakes is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein, Bakes was engaged in substantial and not isolated activity within the State of Florida.

31. Bakes is subject to the jurisdiction of this Court in his capacity as a former officer and director of one or more of the Debtors pursuant to Florida Statutes § 48.193 because Bakes engaged in substantial and not isolated business within the State of Florida as an officer and director of one or more of the Debtors and in those capacities committed tortious acts within the State of Florida.

32. Bakes is sued in both his individual and official capacities.

Andrew McKey

33. Defendant McKey is a citizen and resident of the State of New York.

34. At all times material to the allegations set forth herein, McKey was either an Executive Vice President, Treasurer or Secretary of Far & Wide, as well as a member of Far & Wide's board of directors and/or one or more executive committees of Far & Wide's board of directors.

35. As a result of his participation in the formation of Far & Wide, at all times material to the allegations set forth herein, McKey held approximately 4.4% of Far & Wide's outstanding stock.

36. As Executive Vice President, Treasurer or Secretary of Far & Wide, McKey had the duties and authority that were customarily exercised by such officers of a business corporation of a similar size and stature consistent with his positions and as determined from time to time by Far & Wide's board of directors. He was paid an annual salary of approximately $280,000 plus up to $140,000 in bonus. McKey's compensation was material to him.

37. As Executive Vice President, McKey was responsible for formulating and implementing business plans and policies along with the other officers and directors of Far & Wide.

38. As Executive Vice President, Treasurer, Secretary and Director, McKey controlled and participated in the policies, operations and business of Far & Wide.

39. McKey is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(b) because McKey committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

40. Alternatively, McKey is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(f) because McKey

caused injury to persons and property within the State of Florida while engaged in solicitation or service activities within the State of Florida, from which injuries this cause of action arises.

41. Alternatively, McKey is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein, McKey was engaged in substantial and not isolated activity within the State of Florida.

42 McKey is subject to the jurisdiction of this Court in his capacity as a former officer and director of one or more of the Debtors pursuant to Florida Statutes § 48.193 because McKey engaged in substantial and not isolated business within the State of Florida as an officer and director of one or more of the Debtors and in those capacities committed tortious acts within the State of Florida.

43. McKey is sued in both his individual and official capacities.

Craig Toll

44. Defendant Toll is a citizen and resident of the State of Florida.

45. At all times material to the allegations set forth herein, Toll was Chief Financial Officer of Far & Wide.

46. As CFO, Toll had the duties normally assumed by Chief Financial Officers of enterprises of similar scope and size and any other responsibilities assigned to him by the Chief Executive Officer, Chief Operating Officer, or the Board of Directors. Toll was paid an annual salary of approximately $236,250 plus up to $118,125 in bonus. Toll's compensation was material to him.

47. As CFO, Toll was responsible for directing Far & Wide's financial goals, objectives, and budgets. Toll was also responsible for supervising Far & Wide's cash management activities, maintaining the books and records of Far & Wide, and gathering all relevant financial information for reports to Far & Wide's lenders and consultants.

48. As CFO, Toll controlled and participated in the policies, operations and business of Far & Wide.

49. Toll is subject to the jurisdiction of this Court in his individual capacity due to his residency in the State of Florida.

50. Alternatively, Toll is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(b) because Toll committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

51. Alternatively, Toll is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(f) because Toll caused injury to persons and property within the State of

Florida while engaged in solicitation or service activities within the State of Florida, from which injuries this cause of action arises.

52. Alternatively, Toll is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein, Toll was engaged in substantial and not isolated activity within the State of Florida.

53. Toll is subject to the jurisdiction of this Court in his capacity as a former officer of one or more of the Debtors pursuant to Florida Statutes § 48.193 because Toll engaged in substantial and not isolated business within the State of Florida as an officer of one or more of the Debtors and in such capacity committed tortious acts within the State of Florida.

54. Toll is sued in both his individual and official capacities.

George Gremse

55. Defendant Gremse is a citizen and resident of the State of Florida.

56. At all times material to the allegations set forth herein, Gremse was Chief Operating Officer and/or President of Far & Wide.

57. As COO and/or President of Far & Wide, Gremse was responsible for the duties normally

assumed by such officers of enterprises of similar scope and size and any other responsibilities assigned to him by the Chief Executive Officer or the board of directors. Gremse was paid an annual salary of approximately $310,000 plus up to $155,000 in bonus. Gremse's compensation was material to him.

58. As COO and/or President, Gremse was responsible for planning and coordinating Far & Wide's operations, including, with the CEO and CFO, formulating policies, managing daily operations, marketing tour packages to the public, and planning the use of materials and corporate resources.

59. As COO and/or President, Gremse controlled and participated in the policies, operations and business of the Debtors.

60. Gremse is subject to the jurisdiction of this Court as a resident of the State of Florida.

61. Alternatively, Gremse is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(b) because Gremse committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

62. Alternatively, Gremse is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(f) because Gremse caused injury to persons and property within the State of Florida while engaged in solicitation or

service activities within the State of Florida, from which injuries this cause of action arises.

63. Alternatively, Gremse is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein, Gremse was engaged in substantial and not isolated activity within the State of Florida.

64. Gremse is subject to the jurisdiction of this Court in his capacity as a former officer of one or more of the Debtors pursuant to Florida Statutes § 48.193 because Gremse engaged in substantial and not isolated business within the State of Florida as an officer of one or more of the Debtors and in such capacity committed tortious acts within the State of Florida.

65. Gremse is sued in both his individual and official capacities.

Wellspring and LCF

66. Defendant Wellspring is a Delaware limited liability company with its principal place of business in the State of New York.

67. Wellspring manages a group of private investment partnerships, including LCF, which is focused on investing in or acquiring companies.

68. LCF has no independent business or operations of its own.

69. LCF has no independent employees or offices.

70. LCF is nothing but a special-purpose entity and shell with the sole purpose of acting as a conduit between Wellspring and companies in which Wellspring invests, including Far & Wide.

71. At all times material to the allegations set forth herein, Wellspring controlled and used for its own purposes, LCF through which Wellspring became the largest shareholder of Far & Wide's securities through its infusion of more than $45 million in capital.

72. As a result of Wellspring and LCF's investment of approximately $45 million in Far & Wide, Wellspring and LCF held approximately 52% of Far & Wide's outstanding stock and therefore became Far & Wide's controlling shareholders owing fiduciary duties of due care and loyalty.

73. In connection with the purchase of a majority of Far & Wide's securities, Wellspring designated four of Wellspring's employees, representatives and/or partners as members of the six-member board of directors of Far & Wide. In fact, Wellspring designated Feldman, a Wellspring partner and co-founder, along with fellow Wellspring partners Stanton, Mariano, and Fortin as directors of Far & Wide.

74. As a result of its controlled directors, Wellspring controlled Far & Wide's board of directors and participated in and/or directed the policies, operations

and business of Far & Wide through its designated directors. As a result of their majority voting stock position, Wellspring and LCF exercised actual control over Far & Wide.

75. Wellspring and LCF are subject to the jurisdiction of this Court pursuant to Florida Statutes § 48.193(1)(b) because they both committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

76. Alternatively, Wellspring and LCF are subject to the jurisdiction of this Court pursuant to Florida Statutes § 48.193(1)(f) because they both caused injury to persons and property within the State of Florida while engaged in solicitation or service activities within the State of Florida, from which injuries this cause of action arises.

77. Alternatively, Wellspring and LCF are subject to the jurisdiction of this Court pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein, they both were engaged in substantial and not isolated activity within the State of Florida.

Carl M. Stanton

78. Defendant Stanton is a citizen and resident of the State of New York.

79. Stanton joined Wellspring in 1998 and is a partner in Wellspring.

80. At all times material to the allegations set forth herein, Stanton was an employee, representative and/or partner of Wellspring. Stanton was elected to Far & Wide's board of directors by Far & Wide's controlling shareholders, Wellspring and LCF. As a result of the foregoing, Stanton was dominated and controlled by, and beholden to, Wellspring.

81. At all times material to the allegations set forth herein, Stanton was a member of Far & Wide's board of directors and/or one or more executive committees of Far & Wide's board of directors while he was also an employee, representative and/or partner of Wellspring.

82. As a Director, Stanton controlled and participated in the policies, operations and business of Far & Wide.

83. Stanton is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(b) because Stanton committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

84. Alternatively, Stanton is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(f) because Stanton caused injury to persons and property within the State of Florida while engaged in solicitation or service activities within the State of Florida, from which injuries this cause of action arises.

85. Alternatively, Stanton is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein, Stanton was engaged in substantial and not isolated activity within the State of Florida.

86. Stanton is subject to the jurisdiction of this Court in his capacity as a former director of one or more of the Debtors and as an employee, representative and/or partner of Wellspring pursuant to Florida Statutes § 48.193 because Stanton engaged in substantial and not isolated business within the State of Florida as a director of one or more of the Debtors and an employee, representative and/or partner of Wellspring and in those capacities committed tortious acts within the State of Florida.

87. Stanton is sued in both his individual and official capacities.

Greg S. Feldman

88. Defendant Feldman is a citizen and resident of the State of New York.

89. Feldman is a partner of and co-founder of Wellspring, which was organized in January 1995.

90. At all times material to the allegations set forth herein, Feldman was an employee, representative and/or partner of Wellspring. Feldman was elected to Far & Wide's board of directors by Far & Wide's controlling shareholders, Wellspring and LCF.

As a result of the foregoing, Feldman was dominated and controlled by, and beholden to, Wellspring.

91. At all times material to the allegations set forth herein, Feldman was a member of Far & Wide's board of directors and/or one or more executive committees of Far & Wide's board of directors while he was also an employee, representative and/or partner of Wellspring.

92. As Director, Feldman controlled and participated in the policies, operations and business of Far & Wide.

93. Feldman also managed and controlled LCF.

94. Feldman is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(b) because Feldman committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

95. Alternatively, Feldman is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(f) because Feldman caused injury to persons and property within the State of Florida while engaged in solicitation or service activities within the State of Florida, from which injuries this cause of action arises.

96. Alternatively, Feldman is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein,

Feldman was engaged in substantial and not isolated activity within the State of Florida.

97. Feldman is subject to the jurisdiction of this Court in his capacity as a former director of one or more of the Debtors and as an employee, representative and/or partner of Wellspring and LCF pursuant to Florida Statutes § 48.193 because Feldman engaged in substantial and not isolated business within the State of Florida as a director of one or more of the Debtors and an employee, representative and/or partner of Wellspring of LCF and in those capacities committed tortious acts within the State of Florida.

98. Feldman is sued in both his individual and official capacities.

David C. Mariano

99. Defendant Mariano is a citizen and resident of the State of New York.

100. Mariano joined Wellspring as a partner in 1997.

101. At all times material to the allegations set forth herein, Mariano was an employee, representative and/or partner of Wellspring. Mariano was elected to Far & Wide's board of directors by Far & Wide's controlling shareholders, Wellspring and LCF. As a result of the foregoing, Mariano was dominated and controlled by, and beholden to, Wellspring.

102. At all times material to the allegations set forth herein, Mariano was a member of Far & Wide's board of directors and/or one or more executive committees of Far & Wide's board of directors while he was also an employee, representative and/or partner of Wellspring.

103. As a Director, Mariano controlled and participated in the policies, operations and business of Far & Wide.

104. Mariano is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(b) because Mariano committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

105. Alternatively, Mariano is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(f) because Mariano caused injury to persons and property within the State of Florida while engaged in solicitation or service activities within the State of Florida, from which injuries this cause of action arises.

106. Alternatively, Mariano is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein, Mariano was engaged in substantial and not isolated activity within the State of Florida.

107. Mariano is subject to the jurisdiction of this Court in his capacity as a former director of one

or more of the Debtors and as an employee, representative and/or partner of or in Wellspring pursuant to Florida Statutes § 48.193 because Mariano engaged in substantial and not isolated business within the State of Florida as a director of one or more of the Debtors and an employee, representative and/or partner of or in Wellspring and in those capacities committed tortious acts within the State of Florida.

108. Mariano is sued in both his individual and official capacities.

Jason B. Fortin

109. Defendant Fortin is a citizen and resident of the State of New York.

110. Fortin joined Wellspring in 1995 and became a principal.

111. At all times material to the allegations set forth herein, Fortin was an employee, representative and/or partner of Wellspring. Fortin was elected to Far & Wide's board of directors by Far & Wide's controlling shareholders, Wellspring and LCF. As a result of the foregoing, Fortin was dominated and controlled by, and beholden to, Wellspring.

112. At all times material to the allegations set forth herein, Fortin was a member of Far & Wide's board of directors and/or one or more executive committees of Far & Wide's board of directors while he was also an employee, representative and/or partner of Wellspring.

113. As a Director, Fortin controlled and participated in the policies, operations and business of Far & Wide.

114. Fortin is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(b) because Fortin committed tortious acts within the State of Florida, from which tortious acts this cause of action arises.

115. Alternatively, Fortin is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(1)(f) because Fortin caused injury to persons and property within the State of Florida while engaged in solicitation or service activities within the State of Florida, from which injuries this cause of action arises.

116. Alternatively, Fortin is subject to the jurisdiction of this Court in his individual capacity pursuant to Florida Statutes § 48.193(2) because at all times material to the allegations set forth herein, Fortin was engaged in substantial and not isolated activity within the State of Florida.

117. Fortin is subject to the jurisdiction of this Court in his capacity as a former director of one or more of the Debtors and as an employee, representative and/or partner of Wellspring pursuant to Florida Statutes § 48.193 because Fortin engaged in substantial and not isolated business within the State of Florida as a director of one or more of the Debtors and an employee, representative and/or partner of or

in Wellspring and in those capacities committed tortious acts within the State of Florida.

118. Fortin is sued in both his individual and official capacities.

JURISDICTION

119. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1334 because the claims contained herein relate to the bankruptcy case of the Debtors under title 11 of the United States Code. *See In re: Far & Wide Corporation, et al.*, Case No. 03-40415-BKC-RAM.

120. The Court also has jurisdiction over this action pursuant to the supplemental jurisdiction provisions of 28 U.S.C. § 1367 and under the doctrines of pendent, supplemental and ancillary subject matter jurisdiction.

VENUE

121. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391 because a substantial part of the events and omissions giving rise to the claims set forth herein occurred in the Southern District of Florida.

GENERAL ALLEGATIONS

The Creation of Far & Wide

122. In 1999, Bakes and McKey were investment bankers and principals of the investment banking firm they formed together, Sojourn Enterprises, Inc. Sojourn Enterprises is based in Miami, Florida. Bakes and McKey served on Far & Wide's Board of Directors while also serving as Officers of Far & Wide.

123. Bakes and McKey formed Far & Wide in March 1999 with Wellspring's initial investment, through its investment vehicle LCF, which Wellspring similarly controlled, of $40 million. In January 2000, Wellspring invested another $5 million into Far & Wide. In return, Wellspring and LCF owned or controlled 52% of Far & Wide's outstanding stock and became Far & Wide's controlling shareholders.

124. Together, Bakes and McKey as insider directors, and Wellspring and LCF, as controlling shareholders, owned or controlled approximately 65.1% of Far & Wide's outstanding stock.

125. As a condition of its investment into Far & Wide, Wellspring required the appointment of four Wellspring partners – Stanton, Feldman, Mariano, and Fortin – to serve on Far & Wide's six-member board of directors. As a result of the appointment of Stanton, Feldman, Mariano, and Fortin to Far & Wide's board of directors, Wellspring controlled Far & Wide's board of directors.

126. In October 1999, Bakes was appointed along with Fortin and Feldman to serve on the board of directors of the Hockey Company. Like Far & Wide, the Hockey Company was another portfolio company in which Wellspring had a substantial investment and for this reason appointed affiliated persons like Bakes, Fortin and Feldman to serve on its board of directors to protect and advance its interests. Bakes was consequently further beholden to Wellspring for this appointment and its attendant perquisites and benefits, as well as for his officer and director role at Far & Wide.

127. Because of Wellspring's management and control of Far & Wide in June 1999, Far & Wide closed a $70 million Revolving Credit Facility with a group of banks comprised of Fleet National Bank, Heller Financial, Inc., The Bank of Nova Scotia and The Bank of New York (the "Bank Group Loan").

128. Also because of Wellspring's management and control of Far & Wide in June 2000, Far & Wide closed a $20 million transaction involving Senior Subordinated Notes issued to Albion Alliance Mezzanine Fund II, L.P (the "Albion Loan").

129. By 1999, Bakes, McKey, Stanton, Feldman, Mariano and Fortin had observed the exorbitant success experienced by other investment bankers and private equity funds in the 1990s through the use of a business strategy that consolidated a portion of a particular industry by acquiring several smaller companies, "rolling" them up into one larger enterprise,

and positioning the single merged entity for a quick sale or public securities offering at an enormous profit.

130. Based on these observations and with the use of Wellspring's $45 million investment, the $70 million Bank Group Loan, and the $20 million Albion Loan, Bakes, McKey, Stanton, Feldman, Mariano and Fortin caused Far & Wide to proceed to consolidate a portion of the worldwide tour industry by merging, or "rolling-up," 21 companies which provided travel-related products in Europe, South America, Australia, and New Zealand, primarily to U.S. and Canadian consumers.

131. Bakes, McKey, Stanton, Feldman, Mariano and Fortin intended to package the 21 companies Far & Wide acquired and merged into a consolidated enterprise for a short-term sale at an enormous profit for its controlling shareholders, Wellspring and LCF, and for the personal benefit of the insider directors, Bakes and McKey.

132. The "roll-up" plan was referred to from time to time by Bakes, McKey, Stanton, Feldman, Mariano and/or Fortin as "Plan A."

133. As a consequence of the roll-up Far & Wide became indebted to the Bank Group for approximately $70 million under the Bank Group Loan, to Albion for approximately $20 million under the Albion Loan, and to the former owners of the acquired companies for approximately $10 million in

several Subordinated Seller Notes securing earn-out obligations to these sellers.

134. By late August 2001, after the roll-up was essentially completed, Far & Wide was a sprawling, unwieldy 21-unit company that lacked a quintessential economy of scale that would permit this albatross to operate profitably.

135. Specifically, the consolidated entity lacked any uniform bookkeeping system that could effectively and accurately track revenues and expenditures that was critical to the management and survival of Far & Wide. Far & Wide's affairs would remain in this dysfunctional state until Far & Wide filed its bankruptcy petition in September 2003.

Far & Wide's Shareholders

136. As a result of Wellspring's and LCF's investment of approximately $45 million into Far & Wide, Wellspring held approximately 52% of Far & Wide's outstanding stock.

137. In consideration for their participation in the formation of Far & Wide, Bakes held approximately 8.7% and McKey held approximately 4.4% of Far & Wide's outstanding stock.

138. As a result of their 1998 investment of approximately $1.1 million into Far & Wide, several Phase II investors held approximately 3.9% of Far & Wide's outstanding stock.

139. As a consequence of the roll-up, several of the former owners of the companies acquired by Far & Wide were issued or had reserved for them in the form of warrants approximately 20.6% of Far & Wide's outstanding common stock.

140. As a result of the $20.0 million Albion Loan, approximately 5.4% of Far & Wide's outstanding common stock was reserved for Albion in the form of warrants.

141. By virtue of Far & Wide's 1999 stock option plan for management, in which Bakes, McKey, Gremse and Toll also participated, approximately 5.4% of Far & Wide's outstanding common stock was reserved for management options.

The Worldwide Travel Industry

142. Although the Defendants have laid all blame for the demise of Far & Wide upon a host of socio-political and economic events ranging from 2001 through 2003, these regional and world events hardly [sic] for the losses incurred by Far & Wide during the same period. Indeed, several national and international competitors of Far & Wide survived the same events unscathed.

143. Rather, in executing its failed roll-up strategy, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin failed or refused to adjust Far & Wide's budget, booking and revenue projections and cash positions to account for the impact

worldwide events might have had on the financial performance [of] a global travel company.

144. Rather than accounting for the predictable impact that such events might have had on Far & Wide's budgeting, booking and revenue projections and cash positions, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin continued to religiously adhere to budgets, projections, and cash flow pro formas that were unrealistic and unsupportable merely to justify to potential suitors the artificially inflated valuation of the company contemplated by the roll-up strategy, as supported by negligently prepared audited financial statements.[3]

Far & Wide Becomes and Remains Insolvent

145. Soon after its formation in 1999, Far & Wide defaulted under a provision of the Bank Group Loan Documents that required it to maintain the critical ratio of the Bank Group Loan balance to EBITDA below 3.7:1.0.

146. By March 2000, Far & Wide was also in default under other provisions of the Bank Group Loan Documents as well. Specifically, Far & Wide failed to maintain the ratio of the Bank Group Loan balance to EBITDA below 3.0:1.0; the ratio of its total

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[3] Claims against Far & Wide and Ernst & Young have been submitted to arbitration

debt to EBITDA below 2.5:1.0; and have positive net income.

147. In May and August 2001, the Bank Group further notified Far & Wide of certain additional events of default.

148. Prior to September 11, 2001, Far & Wide had experienced revenues much lower than projected, purportedly because of a slow economy.

149. After the attacks of September 11, 2001, which resulted in substantial customer refunds and costs associated with the needs of stranded travelers, Far & Wide began to experience a liquidity crisis from which it never recovered.

150. Because Far & Wide was not financially positioned to adjust to such a convergence of world events, it quicky [sic] defaulted on its other obligations, in addition to [sic] owed to the Bank Group.

151. Consequently, in November 2001, Far & Wide entered into the first of a series of short term forbearance agreements with the Bank Group. At that time, Far & Wide had approximately $85.0 to 95.0 million in outstanding debt under the Bank Group Loan, the Albion Loan and the Seller Notes.

152. With the expiration of each forbearance agreement, Bakes, McKey, Stanton, Feldman, Mariano, and Fortin negotiated a subsequent forbearance agreement. The term of the first forbearance agreement ran from November 2001 to January 2002. The second forbearance agreement extended

the first from January 2002 to April 2002. The third forbearance agreement extended the second from April 2002 to August 2002.

153. In consideration for its agreement not to foreclose the Bank Group Loan, the Bank Group also received Far & Wide stock warrants.

154. In addition to the foregoing, one of the original terms of the Bank Group Loan documents that required Far & Wide to maintain 50% of all customer deposits in a reserve account that was a part of the Bank Group collateral was eliminated in January 2002 during the negotiation of the second forbearance agreement.

155. With full reign of 100% of all customer deposits, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin caused Far & Wide to use these funds to chip away at Far & Wide's chronic liquidity crisis. These funds were used to pay for the expenses and trips of Far & Wide customers who had previously traveled.

156. Moreover, as a result of the chronic liquidity crisis Far & Wide experienced in 2001, Bakes, McKey, Gremse and Toll began to stretch the company's accounts payable to trade vendors well beyond their ordinary payment terms.

157. As a further consequence of Far & Wide's chronic liquidity crisis, Far & Wide's use of customer deposits to fund current operations rather than reserving them for future travel, and coupled with the

extension of accounts payable to trade vendors, Far & Wide began to operate with an irreversible chronic negative working capital deficit of between $30 and $50 million.

158. Other than forbearance fees it negotiated with the Bank Group, Far & Wide could not make and indeed failed to make any regular principal or interest payments on any of its outstanding indebtedness under the Bank Group Loan, the Albion Loan, or the Seller Notes.

159. As a result of: (1) the chronic liquidity crisis; (2) Far & Wide's inability to meet its obligations under its outstanding indebtedness; (3) its lack of reserves funded by its use of customer deposits; and (4) stretching out vendor payments, Far & Wide did not have the ability to satisfy its obligations as they came due in the ordinary course of business.

160. Despite this dire financial condition and historical failure to meet all projections and despite two going concern opinions rendered by its auditors at Ernst & Young, the company's audited financial statements did not write down or discount Far & Wide's goodwill, in direct violation of generally accepted accounting principles and certain FASB regulations. In reality, Far & Wide had a negative net equity from 2001 to 2003 of nearly $150 million.

161. Because it could not meet its obligations as they came due and because its liabilities far exceeded its assets, Far & Wide became and remained insolvent from early 2002 through September 2003.

162. At no time after early 2001 did Far & Wide ever return to solvency.

Far & Wide's Retains CIBC World Markets to Execute "Plan A"

163. In early 2002, Bakes, McKey, Stanton, Feldman, Mariano and Fortin interviewed five investment banks in connection with the implementation and execution of "Plan A." Also referred to as "Project Horizon," Plan A contemplated selling the rolled-up Far & Wide enterprise at a price that would earn Wellspring and LCF as controlling shareholders, and Bakes and McKey as insider directors, a substantial return on their investments.

164. The Bank Group's waiver of the restriction on the use of customer deposits was based in part on the insistence by Bakes, McKey, Stanton, Feldman, Mariano and Fortin that Plan A was possible and that a "white knight" could be found to purchase the rolled-up enterprise.

165. After interviewing several investment banks, Bakes, McKey, Stanton, Feldman, Mariano and Fortin caused Far & Wide to retain CIBC World Markets, Inc. ("CIBC") in February 2002 to market and sell the Far & Wide enterprise.

166. In instructing CIBC to market and sell the rolled-up Far & Wide enterprise to carry out Plan A, Bakes, McKey, Stanton, Feldman, Mariano and

Fortin informed CIBC that they would only accept "qualified" offers from targeted investors.

167. The parameters for a "qualified" offer were established by Bakes, McKey, Stanton, Feldman, Mariano, and Feldman to guarantee that earned Wellspring, LCF, Bakes, and McKey a substantial return on their investments.

168. The valuation of the rolled-up Far & Wide enterprise underlying the "qualified" offer Wellspring, LCF, Bakes, and McKey would accept was artificially propped up by audited financial statements provided by Ernst & Young LLP, in the preparation of which Ernst & Young did not apply accounting standards that required the write down of a substantial majority of the $175 million in goodwill Far & Wide carried on its books.

169. A substantial majority of the $175 million in goodwill that Far & Wide carried on its books was not written down despite accounting requirements to do so under generally accepted account principles whenever the auditor issues a going concern opinion.

170. In spring 2002, CIBC prepared a Confidential Descriptive Memorandum of the rolled up Far & Wide enterprise and circulated it to approximately 31 investors who had signed confidentiality agreements.

171. Under Plan A, Bakes, McKey, Stanton, Feldman, Mariano and Fortin intended to receive and evaluate preliminary indications of interest in the first three weeks of June 2002 followed by management

presentations by Bakes, McKey, Stanton, Feldman, Mariano, and Fortin during the first three weeks of July 2002, followed by the close of a proposed transaction by mid-August 2002.

172. This schedule shaped the negotiations regarding the series of forbearance agreements that were negotiated with the Bank Group.

173. In June 2003, Libra Securites [sic] LLC took over the engagement for CIBC as Far & Wide's investment banker in Bakes, McKey, Stanton, Feldman, Mariano, and Fortin's continued pursuit of selling Far & Wide for a substantial return on Wellspring's investment.

Defendants Pursue Plan A To The Exclusion of Other Value-Preserving Measures

174. When Far & Wide entered into its first forbearance agreement with the Bank Group in November 2001, the Bank Group required it to work with KPMG Advisory Services ("KPMG"). Under the forbearance agreements, Bakes, McKey, Gremse and Toll were required to provide to KPMG Far & Wide's weekly reports with information regarding forward customer bookings, a cash flow forecast, a cash budget, a cash account balance, weekly bookings, and cancellations.

175. Because Far & Wide's reports were so inadequate, in the second forbearance agreement in

January 2002, the Bank Group required Far & Wide to hire and use a professional business consultant to consult on managing the business through the forbearance period. In February 2002, Far & Wide hired TRG as its consultant. As a result, the Defendants knew that Far & Wide's financial reporting and controls was deficient.

176. The forbearance period was intended to provide an opportunity for Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin to take steps to make the company self-sufficient, profitable and able to meet its outstanding liabilities.

177. Soon after beginning its engagement in March 2002 until it resigned its engagement in frustration in August 2002, KPMG expressed concerns that the weekly reports, projections, budgets, and cashflow reports submitted by Bakes, McKey, Gremse and Toll to the Bank Group were inadequate and/or unrealistic and repeatedly urged them to address these deficiencies so they could successfully steer Far & Wide through the forbearance period.

178. Bakes, McKey, Gremse and Toll refused to follow KPMG's advice.

179. Soon after beginning its engagement in February 2002, TRG oriented themselves with Far & Wide's dire financial condition, its outstanding liabilities under Bank Group Loan, the Albion Loan, and the Seller Notes, Far & Wide's poor sales performance, and the performance of the travel industry generally.

180. With this orientation and in response to learning that Bakes, McKey, Stanton, Feldman, Mariano, and Fortin intended to focus their efforts on selling the company to an outside investor for a substantial return on Wellspring and LCF's investment, TRG urged Bakes, McKey, Gremse, Toll. Stanton, Feldman, Mariano and Fortin that it was necessary for them to develop a "Plan B," if Plan A failed.

181. Plan B was designed to include a plan to address Far & Wide's chronic liquidity problem; raise new equity; raise a seasonal bridge loan; reduce expenses and marketing costs; close unproductive business units; minimize capital expenditures; consolidate locations; and right-size the company so Far & Wide could be self-sufficient and profitable.

182. Like the measures urged by KPMG, these measures were designed to preserve the value of the Far & Wide corporate entity so it could become self-sufficient and meet its outstanding liabilities.

183. By virtue of the dual roles held by Stanton, Felman [sic], Mariano and Fortin as partners of Wellspring and LCF, the controlling shareholders, on the one hand, and directors of Far & Wide on the other, they had serious conflicts of interest because the interests of Wellspring and LCF, the controlling shareholders, were pitted against the interests of the Far & Wide corporate entity, which was subject to the claims of Far & Wide's creditors when Far & Wide became insolvent. In other words, as controlling

equity holders, Wellspring and LCF, and thus their designees on the Far & Wide board of directors, were motivated to act contrary to the best interests of Far & Wide's residual beneficiaries once Far & Wide became insolvent.

184. In addition, during the time Wellspring controlled Far & Wide, Stanton, Feldman, Mariano, and Fortin were in the process of raising capital for a third private investment fund controlled by Wellspring. This third fund was to be twice as large as the fund used to invest in Far & Wide. Any publicity surrounding the need to reorganize a company in which Wellspring had so heavily invested would have severely compromised Wellspring's efforts in raising additional capital for this third fund. These capital raising efforts on behalf of Wellspring further impaired the judgment of the Wellspring-controlled directors.

185. By virtue of their status as significant individual stockholders in Far & Wide, the judgment of Bakes and McKey as insider directors was similarly impaired by a conflict of interest which pitted their personal interests as Far & Wide employees and shareholders against the interests of the Far & Wide corporate entity.

186. The conflict of interest impairing Bakes's judgment was even greater in light of his further alignment with the interests of Wellspring, particularly as a director of another Wellspring portfolio company, namely, the Hockey Company.

187. It became clear from February 2002 and beyond that for Bakes, McKey, Stanton, Feldman, Mariano and Fortin the simultaneous pursuit of Plan A and Plan B would be at odds as they had to proceed along mutually exclusive paths.

188. Between March and August 2002 when TRG repeatedly urged Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin to develop and implement a Plan B to preserve the value of the assets owned by the Far & Wide corporate entity, this advice was ignored because it was not in their personal interests.

189. For example, in March 2002, Bakes, McKey, Stanton, Feldman, Mariano, and/or Fortin caused to be communicated to TRG that pursuit of Plan A made it difficult to make business unit closures and other significant cost reductions. It was perceived by the directors that selling the business units and/or assets would impair the market value of the rolled-up entity, thereby reducing, if not eliminating, the profit Wellspring, LCF, Bakes and McKey could expect.

190. In response to TRG's repeated requests for the development of a Plan B in April 2002, Bakes, McKey, Stanton, Feldman, Mariano, and/or Fortin advised TRG that they never contemplated developing a Plan B and, further, that Far & Wide did not have one.

191. In response to further urgent requests regarding the development of Plan B, Bakes, McKey,

Stanton, Feldman, Mariano, and/or Fortin caused to be communicated to TRG in April 2002 that Plan B should be put off until Plan A was given a chance to succeed.

192. Consistent with the position that Plan A and Plan B were mutually exclusive paths, Bakes, McKey, Stanton, Feldman, Mariano and/or Fortin continued to push off the deadline for any development of a Plan B into August 2002, the time by which they hoped they would have sold Far & Wide for a substantial return on Wellspring's investment and profit for Bakes and McKey.

The Ableco and Wellspring Loan Transactions

193. As of June 2002 there was no "qualified" interest among potential investors in purchasing the rolled-up Far & Wide enterprise.

194. Plan A had contemplated that a sale of the rolled-up enterprise would be completed by mid-August 2002. By the end of July 2002, there was still no interest in purchasing the rolled up Far & Wide enterprise and it was clear that Plan A was neither realistic nor responsible.

195. By August 2002, as a result of their focus on Plan A to the exclusion of addressing the serious deficiencies facing Far & Wide's operations, Far & Wide began to experience an even greater liquidity crisis, when even the practice of using customer deposits to fund operations was insufficient.

196. By October 2002, Far & Wide owed approximately $53 million to the Bank Group, approximately $21.1 to Albion, approximately $11.6 in Seller Notes and still carried a chronic negative working capital deficit between $30 and $50 million.

197. In light of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally in October 2002, had Bakes, McKey, Gremse Toll, Stanton, Feldman, Mariano, and Fortin explored reorganizing Far & Wide they would have satisfied their fiduciary duties to the Far & Wide corporate entity.

198. Bakes, McKey, Stanton, Feldman, Mariano, and Fortin, however, did not entertain bankruptcy because they remained focused on the remote and unrealistic hope that Plan A could be salvaged and Wellspring [sic] and that Bales and McKey (with their collective 13% stock ownership) and Wellspring and LCF (with their 52% stock ownership) could recover a return on their investments sometime in mid-2003.

199. Had Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin chosen to reorganize Far & Wide in October 2002, Wellspring would have arguably lost any hope of a distribution on its $45 million investment.

200. Had Bakes, McKey, Stanton, Feldman, Mariano and Fortin considered Far & Wide's dire financial condition, its outstanding obligations, its

poor sales performance, and the performance of the travel industry generally in October 2002, the result of the inquiry would have demanded that they seek protection of bankruptcy or otherwise reorganize the company in order to preserve the value of the assets owned by the Far & Wide corporate entity.

201. Instead of seeking bankruptcy protection to preserve the value of the assets owned by the Far & Wide corporate entity, Bakes, McKey, Stanton, Feldman, Mariano, and Fortin negotiated a $10.0 million loan with Ableco Finance LLC, a self-described "opportunistic lending company," formed by Cerberus Capital Management, L.P.

202. In October 2002, Bakes, McKey, Stanton, Feldman, Mariano, and Fortin caused Far & Wide to enter into the $10.0 million loan with Ableco. Bakes, McKey, Stanton, Feldman, Mariano, and Fortin then caused Far & Wide to enter into a matching $10.0 million loan with Wellspring. Both loans carried interest rates of 10% over Prime, but not less than 14.75%. Far & Wide incurred $1,329,000 in fees in connection with obtaining the Ableco Loan.

203. Through an Intercreditor Agreement with the Bank Group, and an Amendment to the Subordination Agreement pertaining to the Albion Loan, Ableco became the Senior Secured lender with first priority on Far & Wide's assets, followed by the secured claim of Wellspring, then the secured claim of Bank Group and then Albion.

204. Through these agreements, Bakes, McKey, Stanton, Feldman, Mariano, and Fortin spuriously converted a portion of Wellspring's equity position into a debt claim with penultimate priority in the event of Far & Wide's bankruptcy.

205. Despite the fact that Wellspring became a senior secured lender, neither Stanton, Feldman, Mariano, nor Fortin as partners of Wellspring, insisted that independent outside directors be appointed to analyze and decide upon the financial prudence of closing on the loan, nor as partners of the controlling shareholders Wellspring and LCF did they consult with the minority shareholders.

206. In light of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally and the problems identified by KPMG and TRG during their respective engagements, the amount of money provided by the Ableco and Wellspring loans was hardly sufficient to materially improve Far & Wide's dire financial condition.

207. Had Bakes, McKey, Stanton, Feldman, Mariano and Fortin filed for protection under Chapter 11 or liquidated Far & Wide instead of securing the Ableco and Wellspring loans, they could have conserved millions of dollars in cash and debt, sold off the unproductive units as urged by TRG and otherwise restructured Far & Wide's outstanding obligations to customers who made deposits for future

travel and vendors who had provided travel services for customers in the past.

208. In the alternative, rather than spending the Ableco and Wellspring loans to pay interest to the Bank Group and cover a small percentage of operating expenses, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin could have used a substantial portion of the Ableco and Wellspring loans to finance a reorganization from a position of strength with millions of dollars in the bank.

209. The decision to enter into the Ableco and Wellspring loans in October 2002 and the terms of these transactions were not approved by a majority of independent and disinterested Far & Wide directors nor were they approved by Far & Wide's minority shareholders.

210. In light of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally in October 2002, the decision to enter into and the terms of the Wellspring and Ableco loan transactions were unfair to the Far & Wide corporate entity.

211. Between October 2002 and July 2003, Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally had not materially improved to justify the further pursuit of Plan A.

212. Between October 2002 and July 2003 the value of the assets owned by the Far & Wide corporate entity continued to diminish while the travel market did not improve and, because of international events, in fact deteriorated.

213. Between October 2002 and July 2003, Bakes, McKey, Stanton, Feldman, Mariano, and Fortin did not attempt to reorganize Far & Wide because they remained focused on Plan A.

214. In June 2003, Bakes, McKey, Stanton, Feldman, Mariano, and Fortin caused Far & Wide to replace CIBC with Libra Securities LLC to continue to market and sell the company.

215. Also in June 2003, by now cognizant of their liability as Far & Wide directors and officers, Bakes, McKey, Stanton, Feldman, Mariano and/or Fortin caused Far & Wide to purchase additional directors and officers' liability insurance for themselves, increasing their insurance protection from $6 million to $16 million.

216. When the Ableco matured in July 2003 and Far & Wide was still unable to service the Ableco debt or any of its $120 million in outstanding debt, Bakes, McKey, Stanton, Feldman, Mariano, and Fortin requested to extend the payment date on the Ableco loan to January 2004.

217. The extension of the Ableo [sic] loan merely forestalled the inevitable.

218. The decision to extend the Ableco loan and the terms of the extension of the Ableo [sic] loan were not approved by a majority of independent and disinterested directors nor by minority shareholders.

219. In light of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally in July 2003, the decision to extend the Ableco loan was unfair to the company.

220. Between July 2003 and September 2003, the value of the assets owned by the Far & Wide corporate entity continued to diminish.

Continuing to Market And Accept Customer Deposits From Customers Who Would Never Travel

221. In January 2003 and thereafter, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin continued to cause Far & Wide to aggressively pursue deposits from customers who would be traveling later in the year. This deposit money was used to market tours, to cover operating expenses and pay for services rendered to currently traveling customers.

222. In January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin continued to cause Far & Wide to stretch payments to vendors who had already provided services to Far & Wide for 60 days and beyond.

223. As a result of these practices directed toward Far & Wide's customers on the one hand and its vendors on the other and consistent with their practice through 2002, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin caused the Far & Wide corporate entity to incur the obligation to provide travel services and pay vendors, even though from January through September 2003, it was obvious that neither a sale nor equity investment was on the horizon and Far & Wide would run out of cash.

224. Consequently, Far & Wide continued to carry a negative working capital deficit of between $30 tot [sic] $50 million through September 2003.

2256 [sic]. From January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin had personal knowledge of, but caused Far & Wide to intentionally conceal its true dire financial condition to, the customers from whom Far & Wide demanded deposits and from vendors who continued to provide services to Far & Wide customers.

226. From January through September 2003, Bakes, McKey, Stanton, Feldman, Mariano, and Fortin knew or should have known that there was a substantial likelihood that the customers they sold excursions to would never take those trips.

227. From January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's active concealment and omission from Far & Wide's vendors, customers, and other

creditors, of the true dire financial condition of Far & Wide was likely to and in fact did mislead Far & Wide's customers and vendors to their detriment.

Collapse Without Bankruptcy Planning

228. From January through September 2003, Bakes, McKey, Stanton, Feldman, Mariano and Fortin remained committed to avoiding a bankruptcy that would have compromised Wellspring's equity and, but for its senior secured loan for $10.0 million, would have left Wellspring at the bottom of the priority scheme for repayment, behind Far & Wide's employees, customers, and vendors.

229. On September 10, 2003, Wellspring advanced an additional $400,000 to Far & Wide to keep it operating in the vain hope of securing a gullible buyer.

230. As with its previous October 2002 loan, this $400,000 advance was added to Wellspring's senior secured claim which enjoyed priority over existing trade creditors.

231. When this cash infusion evaporated on or around September 23, 2003, Bakes, McKey, Stanton, Feldman, Mariano and Fortin, without any advanced planning or notice, paid Holland & Knight LLP a $300,000 retainer to file for bankruptcy and cease operations.

232. Upon learning of the bankruptcy, vendors worldwide refused to render services to Far & Wide customers.

233. Several thousand customers who had paid for their trips in full prior to departure were left stranded across the globe. As of September 24, 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin had caused Far & Wide to spend these customers' deposits to pay for Far & Wide's operating expense [sic] and for earlier travelers' trips.

234. Customers who had paid Far & Wide and were left stranded abroad and customers who had paid Far & Wide but had yet to travel filed claims against Far & Wide in excess of $25 million. More than $22 million of those claims were filed or scheduled by Far & Wide as priority unsecured claims under the Bankruptcy Code.

235. Between October 2002 and September 23, 2003:

a. Bakes, McKey, Stanton, Feldman, Mariano and Fortin caused Far & Wide to incur $20 million in secured debt in October 2002 at interest rates in excess of 14.75%; and

b. Bakes, McKey, Stanton, Feldman, Mariano and Fortin caused Far & Wide to incur an additional $17 million in trade debt by incurring obligations to vendors of travel services they had no ability to pay.

236. Within months after the petition for bankruptcy was filed, Far & Wide sold most of its 21 operating divisions at fire sale prices. Those divisions, which were purchased for over $150 million were eventually sold within a span of six months for under $14 million.

237. Consequently, more than $130 million in asset value was squandered as a direct and proximate result of the decision of Bakes, McKey, Stanton, Feldman, Mariano and Fortin to forego an excellent business opportunity to reorganize the company and preserve the value of the assets owned by the Far & Wide corporate entity.

238. As of the entry of the Confirmation Order on December 19, 2005, Far & Wide's former employees held priority claims totaling more that [sic] $636,000.

239. As of the entry of the Confirmation Order, Far & Wide's former consumers held priority claims totaling more than $5.6 million.

240. As of the entry of the Confirmation Order, trade creditors, former vendors, employees, consumers, and lenders held general unsecured claims against Far & Wide totaling more than $146 million.

241. During the Plan confirmation proceedings, Plaintiff attempted to secure discovery from Defendants to formulate sufficient allegations to support the claims authorized by the Plan. The United States Bankruptcy Court denied these requests based on the objections and request for a protective order by

Wellspring. Wellspring's argument was based on its assertion that such discovery would be freely available in this action.

Far & Wide Has A Substantial Relationship With The State of Florida

242. Far & Wide was incorporated in the State of Delaware. At the time of its incorporation, Far & Wide's incorporator was located in Miami, Florida.

243. During all times material to the allegations in this Amended Complaint, Far & Wide did not have any bank accounts, offices, employees, real or personal property, or other [sic] any other presence in the State of Delaware.

244. During all times material to the allegations in this Amended Complaint, Far & Wide did not conduct or participate in any meetings or business, or any affair of any kind whatsoever in the State of Delaware. Other than the fact of its incorporation and the minor administrative matters related to its incorporation, Far & Wide has no connection to the State of Delaware.

245. At all times material to the allegations in this Amended Complaint, Far & Wide was headquartered in Miami, Florida, at 80 S.W. 8th Street, Suite 2601Miami, Florida 33130, where Defendants Bakes, Toll and Gremse carried out their duties as Far & Wide's officers. Though McKey resided in Brooklyn, New York, he traveled regularly to conduct Far &

Wide business in person at Far & Wide's headquarters in Miami, Florida.

246. The employment agreements between Far & Wide and Bakes, Gremse and Toll setting forth their respective duties were executed in Florida and governed by Florida law. The employment agreement between Far & Wide and McKey setting forth his duties is governed by Florida law.

247. At Far & Wide's Miami headquarters, Bakes, McKey, Gremse and Toll met and communicated with each other to formulate and carry out Far & Wide's policies and business plans.

248. At Far & Wide's Miami headquarters, Bakes, McKey, Gremese [sic] and Toll met and communicated on a regular basis with the heads of the various business units of Far & Wide to formulate and carry out Far & Wide's policies and business plans.

249. From Far & Wide's Miami headquarters, Bakes, McKey, Gremse and Toll issued directives regarding execution of Far & Wide's policies and business plans to the heads of Far & Wide's various business units and its employees.

250. From Far & Wide's Miami headquarters, Bakes and McKey communicated and/or met with Stanton, Feldman, Mariano and Fortin to satisfy their duties as Far & Wide's directors.

251. At Far & Wide's Miami headquarters, Stanton, Feldman, Mariano and Fortin met and/or

communicated with Bakes and McKey to formulate Far & Wide's business plans.

252. From Far & Wide's Miami headquarters, business plans and other directives formulated as a result of actions taken by Bakes, McKey, Stanton, Feldman, Mariano and Fortin as Far & Wide's board of directors were communicated to the heads of Far & Wide's business units and employees.

253. From Far & Wide's Miami headquarters, Bakes, McKey, Toll Gremse, Stanton, Feldman, Mariano, and/or Fortin communicated and/or met with Far & Wide's auditors, acquisition and due diligence consultants from Ernst & Young, LLP,'s [sic] Miami, Florida offices.

254. From Far & Wide's Miami headquarters, Bakes, McKey, Toll and/or Gremse communicated with the Bank Group regarding the $70 Bank Group Loan, the several forbearance agreements thereunder, and the October 2002 Intercreditor Agreement related thereto.

255. From Far & Wide's Miami headquarters, Bakes, McKey, Toll and/or Gremse communicated with Albion Alliance LLC regarding the $20 Albion Loan as well as the October 2002 Intercreditor Agreement related thereto.

256. From Far & Wide's Miami headquarters, Bakes, McKey, Toll and/or Gremse communicated with Ableco and Wellspring regarding the senior

secured $20 million loan in October 2002 and the July 2003 extension related thereto.

257. From Far & Wide's Miami headquarters, Bakes, McKey, Toll and/or Gremse communicated with CIBC and Libra regarding actions taken to market and sell Far & Wide to an outside investor pursuant to Plan A.

258. From Far & Wide's Miami headquarters, Bakes, McKey, Toll and/or Gremse communicated with and/or directed payments to Far & Wide's vendors and other creditors.

259. From Far & Wide's Miami headquarters, Bakes, McKey, Toll and/or Gremse communicated and/or met with Far & Wide's consultants, KPMG and TRG.

260. From Far & Wide's Miami headquarters, Bakes, McKey, Toll and/or Gremse controlled and communicated with Far & Wide's banks regarding various Far & Wide bank accounts.

261. From Far & Wide's Miami headquarters, Bakes, McKey, Toll and/or Gremse communicated and/or met with Far & Wide's bankruptcy counsel from Holland & Knight's offices in Miami, Florida.

262. Far & Wide filed its petition for bankruptcy protection before the United States Bankruptcy Court for the Southern District of Florida in Miami, Florida. The consolidated case has been pending for four years.

263. Plaintiff is based in the Miami, Florida offices of Rachlin, Cohen & Holtz, LLC.

264. The D&O Trust Agreement and Liquidating Trust Agreement provide for the application of Florida law

265. The injury to the Far & Wide corporate entity was suffered in Miami, Florida, where Far & Wide is headquartered.

Tolling of Any Applicable Statute of Limitations

266. This cause of action accrued in April 2002, when Far & Wide was insolvent. From that time through September 2003, Bakes, McKey, Stanton, Feldman, Mariano and Fortin were under an obligation to take steps to protect the value of the assets owned by the Far & Wide corporate entity.

267. Far & Wide was a privately-held corporation and information regarding its financial information was not publicly available. Far & Wide creditors – customers, employees, and trade vendors – were not in a position to access, nor did they as laypersons have the expertise to evaluate, information regarding the financial position of the company in order to gain knowledge of the claims asserted herein.

268. Far & Wide's creditors reasonably relied upon the competence and good faith of defendants as fiduciaries to protect their interests and the value of the assets owned by the Far & Wide corporate entity.

269. Plaintiff did not become objectively aware of the facts giving rise to the wrongs alleged herein until well after the bankruptcy petition in September 2003 was filed and when it became apparent that Far & Wide's assets were insufficient to satisfy the claims of most of its creditors.

270. Not until the appointment of Plaintiff in December 2005 did Far & Wide creditors have access to some of the information underlying claims asserted herein. In addition, when Plaintiff moved for discovery for information pertaining to the claims asserted herein, but [sic] he was denied the request by the bankruptcy court. The denial was based on the motion for a protective order and objection by Wellspring based on the argument that such information would be readily available in this lawsuit.

271. Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin actively concealed information underlying this action and for this reason and the reasons set forth above, any applicable statute of limitation relating to the claims asserted herein is subject to equitable tolling.

Derivative and Demand Allegations

272. The claims asserted herein are brought pursuant to the Plan, which was litigated before and confirmed by the Untied [sic] States Bankruptcy Court for the Southern District of Florida and affirmed on appeal by the United States District Court for the Southern District of Florida.

273. By virtue of the Plan, a board of directors for Far & Wide no longer existed as of the date of filing of this action. Therefore, to the extent that any demand to the board of directors that it take action or grant relief based on the claims asserted herein would be required under any applicable rule or statute, such demand is no longer required.

274. In any event, the claims asserted herein have been understood by and permitted to be brought by Plaintiff under the Plan confirmed by the United States Bankruptcy Court for the Southern District of Florida, which stands in the shoes of Far & Wide's board of directors.

275. Moreover, to the extent a demand on Far & Wide's board of directors would be required under any applicable rule or statute, the allegations set forth herein are allegations which establish claims for breaches of the fiduciary duty of loyalty and non-exculpated claims for breach of the fiduciary duty of due care.

276. Because these are non-exculpated claims which subject all members of Far & Wide's board of directors to significant personal liability, there existed no disinterested or independent member of the board who would have been able to approve this action at the time of filing and therefore any demand required by any rule or statute would be excused.

277. Plaintiff will fairly and adequately represent the interest of the company as he is required by Florida law to do pursuant to fiduciary duties

imposed upon him by the Plan, the D&O Trust Agreement and the Liquidating Trust Agreement.

278. By virtue of the Plan, the D&O Trust Agreement and the Liquidating Trust Agreement, Plaintiff lawfully represents the interest of the Far & Wide corporate entity and those who were creditors at all times relevant to the course of conduct alleged herein.

COUNT I
DERIVATIVE CLAIM BY CREDITORS FOR VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT ("FDUTPA"), § 501.204, FLA. STAT.
(Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, and Wellspring)

279. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 278 as if set forth fully herein.

280. Pursuant to the Plan, the D&O Trust and the Liquidating Trust Agreements confirmed therein, Plaintiff is empowered as the Liquidating Trustee and as the D&O Trustee to bring claims against Far & Wide's former directors and officers of the Far & Wide corporate entity and on behalf of Far & Wide's creditors.

281. The Far & Wide corporate entity is a person under FDUTPA.

282. In January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin caused Far & Wide to aggressively pursue deposits from customers who would be traveling later in the year. This deposit money was used to market tours, cover operating expenses and pay for the services rendered to currently traveling customers.

283. From January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin had personal knowledge of, but caused Far & Wide to intentionally conceal its true dire financial condition to, the customers from whom Far & Wide demanded deposits and from vendors who continued to provide services to Far & Wide customers.

284. As of January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin knew or should have known that there was a substantial likelihood that the customers they sold excursions to during the [period] from January 2003 onward would never take those trips and that the vendors providing services for customers who currently or soon traveled would never be paid.

285. From January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's active concealment and omission from Far & Wide's vendors, customers, and other creditors, of the true dire financial condition of Far &

Wide was likely to and in fact did mislead Far & Wide's customers and vendors to their detriment.

286. From January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, and Wellspring violated Florida's Deceptive and Unfair Trade Practices Act, which provides in part that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

287. Had Far & Wide's customers known as of January 2003 that it was probable that they would not travel after providing deposits, they would not have purchased their trips from Far & Wide.

288. Had Far & Wide's vendors known as of January 2003 that it was probable that they would not be paid for the services they had provided, they would not have continued to provide services to Far & Wide customers.

289. The Far & Wide corporate entity has suffered damages because its [sic] is indebted to Far & Wide's customers and vendors as a result of the deceptive and unfair trade practices of Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, and Wellspring.

290. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide

corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT II
CLAIM BY FAR & WIDE CORPORATE ENTITY (DEBTOR) FOR VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT ("FDUTPA"), § 501.204, FLA. STAT. (Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, and Wellspring)

291. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 290 as if set forth fully herein.

292. Pursuant to the Plan, the D&O Trust Agreement and the Liquidating Trust Agreement, Plaintiff is entitled to pursue all causes of action belonging to the Far & Wide Corporate entity.

293. The Far & Wide corporate entity is a "person" under FDUTPA.

294. In January through September 2003, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin caused Far & Wide to aggressively pursue deposits from customers who would be traveling later in the year. This deposit money was used to market tours, cover operating expenses and pay for the services rendered to currently traveling customers.

295. From January 2003 and onwards, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin had personal knowledge of, but caused Far & Wide to intentionally conceal its true dire financial condition to, the customers from whom Far & Wide demanded deposits and from vendors who continued to provide services to Far & Wide customers.

296. As of January 2003 and onward, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin knew or should have known that there was a substantial likelihood that the customers they sold excursions to during the [period] from January 2003 onward would never be able take those trips and that the vendors providing services for customers who currently or soon traveled would never be paid.

297. From January 2003 onward, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's active concealment and omission from Far & Wide's vendors, customers, and other creditors, of the true dire financial condition of Far & Wide was likely to and in fact did mislead Far & Wide's customers and vendors to their detriment.

298. From January 2003 and onwards, Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, and Wellspring violated Florida's Deceptive and Unfair Trade Practices Act, which provides in part that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

299. Had Far & Wide's customers known as [of] January 2003 that it was probable that they would not travel after providing deposits, they would not have purchased their trips from Far & Wide.

300. Had Far & Wide's vendors known as of January 2003 that it was probable that they would not be paid for the services they had provided, they would not have continued to provide services to Far & Wide customers.

301. As a result of the deceptive and unfair trade practices of Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortın, and Wellspring. towards Far & Wide's customers and vendors, the Far & Wide corporate entity owes ıts customers and vendors between $30 to $50 million.

302. The Far & Wide corporate entity has suffered damages as a result of the deceptive and unfair trade practices of Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, and Wellspring.

303. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT III
DERIVATIVE CLAIM BY CREDITORS FOR BREACH OF FIDUCIARY DUTY OF LOYALTY
(Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin)

304. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 303 as if set forth fully herein.

305. As of April 2002, Far & Wide was insolvent.

306. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

307. Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, as officers and directors of Far & Wide, owed fiduciary duties to the Far & Wide corporate entity.

308. Pursuant to this fiduciary duty of loyalty, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin were obligated to act in the best interests of the Far & Wide corporate entity and were forbidden from acting against the interests of the Far & Wide corporate entity.

309. Pursuant to this fiduciary duty of loyalty, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin were forbidden from favoring the interests of Wellspring and LCF, Far & Wide's controlling shareholders, the interests of Bakes & McKey, its insider directors, or the interests

of themselves, over the interests of the Far & Wide corporate entity.

310. Notwithstanding their fiduciary duties of loyalty to the Far & Wide' [sic] corporate entity, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin between April 2002 and September 2003, managed and directed Far & Wide for the benefit of Wellspring and LCF, Far & Wide's controlling shareholders, and for the benefit of Bakes and McKey, its insider directors..

311. Defendants' Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's management and direction of Far & Wide for the benefit of Wellspring and LCF, Far & Wide's controlling shareholders, and for the benefit of Bakes and McKey, its insider directors, was at the expense of and to the detriment to the Far & Wide corporate entity and its assets.

312. In managing Far & Wide for the benefit of the Wellspring, LCF, Bakes and McKey, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin breached their fiduciary duty of loyalty to the Far & Wide corporate entity.

313. The decisions to enter into, and the terms of, these October 2002 Ableco and Wellspring transactions were not approved by a majority of disinterested or independent directors, nor were these transactions approved by Far & Wide's minority shareholders.

314. These decisions caused the Far & Wide entity to continue operations outside of bankruptcy protection and resulted in the diminution in value of Far & Wide's assets to a point where Far & Wide did not have any ability to pay its liabilities to its creditors when bankruptcy protection was finally sought in September 2003.

315. As a result, the October 2002 transaction and July 2003 extension were not fair to the Far & Wide corporate entity.

316. This series of actions and decisions to keep Far & Wide out of bankruptcy protection was in conscious disregard of Bakes, McKey, Toll, Gremse, Stanton, Feldman, Mariano, and Fortin's duty to act in the best interests of the Far & Wide corporate entity.

317. In addition, by knowingly engaging in deceptive and unfair trade practices in violation of FDUTPA, Bakes, McKey, Toll, Gremse, Stanton, Feldman, Mariano, and Fortin engaged in knowing violations of the law in further breach of their fiduciary duty of loyalty to the Far & Wide corporate entity.

318. As a direct and proximate result of Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's breach of their fiduciary duty of loyalty, the Far & Wide corporate entity has suffered damages.

319. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants

and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT IV
DERIVATIVE CLAIM BY CREDITORS FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY OF LOYALTY
(Defendants Wellspring and LCF)

320. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 319 as if set forth fully herein.

321. As of April 2002, Far & Wide was insolvent.

322. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

323. As directors and officers of Far & Wide, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin owed fiduciary duties of loyalty to the Far & Wide corporate entity.

324. In return for their substantial investment in Far & Wide, Wellspring and LCF, as Far & Wide's controlling shareholders, placed four of Wellspring's partners on the Far & Wide's board of directors.

These four directors were Defendants Stanton, Feldman, Mariano and Fortin.

325 These directors appointed by Wellspring and LCF, the controlling shareholders, participated in and directed the decision-making process of Far & Wide's board of directors as of April 2002, when Far & Wide was insolvent.

326. As a result of their majority ownership and their majority position on Far & Wide's board of directors, Wellspring and LCF exercised and maintained control over Far & Wide, including control over the insider directors, Bakes and McKey, who were beholden to Wellspring and LCF for their employment, among other things.

327. As a result of the Wellspring and LCF-appointed directors' control over the decision-making process of Far & Wide's board of directors, Wellspring and LCF, as Far & Wide's controlling shareholders, had knowledge of the fiduciary duties of loyalty they owed to the Far & Wide corporate entity. They also knew of the facts and circumstances of the management and direction of Far & Wide for the benefit [of] the controlling shareholders, Wellspring and LCF, at the expense of and to the detriment to the Far & Wide corporate entity.

328. By controlling the decision-making process of Far & Wide's board through the Wellspring and LCF-appointed directors, Wellspring and LCF rendered substantial assistance to and had knowledge of defendants Bakes, McKey, Gremse, Toll, Stanton,

Feldman, Mariano and Fortin's breaches of their fiduciary duty of loyalty to the Far & Wide corporate entity.

329. In rendering knowing and substantial assistance to the fiduciary breaches of the fiduciary duty of loyalty to the Far & Wide corporate entity committed by Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin, Wellspring and LCF aided and abetted Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin's breaches of their fiduciary duty of loyalty to the Far & Wide corporate entity.

330. As a direct and proximate result of Wellspring and LCF's aiding and abetting of the breaches of the fiduciary duty of loyalty committed by Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin to the Far & Wide corporate entity, it has suffered damages.

331. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT V
DERIVATIVE CLAIM BY CREDITORS FOR BREACH OF FIDUCIARY DUTY OF LOYALTY
(Wellspring and LCF)

332. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 331as if set forth fully herein.

333. As of April 2002, Far & Wide was insolvent.

334. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

335. As controlling shareholders of Far & Wide, Wellspring and LCF owed fiduciary duties of loyalty to the Far & Wide corporate entity.

336. As controlling shareholders, Wellspring and LCF controlled Far & Wide's board of directors through its appointment of Stanton, Feldman. Mariano, and Fortin.

337. Through its appointed directors, Wellspring and LCF controlled Far & Wide's board of directors and advanced their own interests in earning a substantial return on Wellspring's $45 million investment.

338. Wellspring and LCF's control of Far & Wide's board of directors to advance their own interests came at the expense of the interests of the Far & Wide corporate entity.

339. In controlling Far & Wide's board of directors, Wellspring and LCF engaged in self-dealing in the October 2002 loan transaction. This transaction was not approved by a majority of disinterested or independent directors, or by minority shareholders.

340. In light of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally in October 2002, the decision to enter into and the terms of the Wellspring loan transaction were not fair to the Far & Wide corporate entity.

341. In advancing their own interests through their control of Far & Wide's board of directors, Wellspring and LCF caused the value of Far & Wide's assets to diminish between April 2002 and September 2003.

342. In addition, by causing Bakes, McKey, Toll, Gremse, Stanton, Feldman, Mariano, and Fortin to engage deceptive and unfair trade practices in violation of FDUTPA, Wellspring and LCF further breached their fiduciary duty of loyalty to the Far & Wide corporate entity.

343. As a direct and proximate result the breaches of the fiduciary duty of loyalty committed by Wellspring and LCF, the Far & Wide corporate entity has suffered damages.

344. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants

and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT VI
DERIVATIVE CLAIM BY CREDITORS FOR BREACH OF FIDUCIARY DUTY OF DUE CARE
(Defendants Bakes, McKey, Gremse, and Toll)

345. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 344 as if set forth fully herein.

346. As of April 2002, Far & Wide was insolvent.

347. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

348. As officers of Far & Wide, Defendants Bakes, McKey, Gremse, and Toll owed fiduciary duties of due care to the Far & Wide corporate entity. Officer violations of the fiduciary duty of due care are not exculpated under applicable law or pursuant to Far & Wide's certificate of incorporation.

349. Pursuant to this fiduciary duty of due care, Defendants Bakes, McKey, Gremse, and Toll were

obligated to act on an informed basis with respect to management decisions.

350. In their management of Far & Wide, Defendants Bakes, McKey, Gremse, and Toll were provided with extensive advice from expert consultants including TRG and KPMG regarding the effective management of Far & Wide while Far & Wide was insolvent.

351. In particular, TRG and/or KPMG advised Defendants Bakes, McKey, Toll and Gremse to:

a. provide accurate financial and booking information to facilitate accurate planning and budgeting;

b. develop a cash budget that was more detailed, accurate, and linked more closely to recent historical performance rather than pure speculation and conjecture;

c. develop a budget based upon Far & Wide's actual needs and disbursements;

d. accept the realities of Far & Wide's industry and current business environment and plan accordingly;

e develop a budget that actually reflects rather than estimates travel booking and revenue forecasts;

f. develop a booking and revenue report that tracks cumulative data to accurately reflect the true financial position of the company;

g. develop a Plan B in the event a sale of the company to an outside investor is not successful and in the event the Company's revenue level remains inadequate, that re-structures the company according to the company's actual performance and outlook;

h. develop and implement a plan that makes significant cost reductions and closes unproductive business units;

i. dedicate limited resources for generating booking revenue in 2002, rather than sales for 2003; and

j. demonstrate how Far & Wide could be self-sufficient without taking on more debt.

352. The expert advice from both TRG and KPMG was readily available to Defendants Bakes, McKey, Gremse, and Toll and was communicated in face to face meetings, telephone conferences and over email between February 2002 and September 2003.

353. In light of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the travel industry generally between February 2002 and September 2003, the reasonableness of the expert advice provided by TRG and KPMG was obvious.

354. The failure or refusal to rely and act upon the expert advice provided by TRG and/or KPMG was the product of conduct that exceeds even gross

negligence on the part of Defendants Bakes, McKey, Toll and Gremse.

355. Notwithstanding the readily available and obvious expert advice provided by TRG and/or KPMG, Defendants Bakes, McKey, Gremse, and Toll refused or failed to follow this advice in their management of Far & Wide.

356. Defendants Bakes, McKey, Gremse, and Toll's failure or refusal to rely and act upon the expert advice provided by TRG and KPMG was not in good faith as it furthered their own self-interest and not the interests of the Far & Wide corporate entity.

357. Rather, Defendants Bakes, McKey, Gremse, and Toll's failure or refusal to rely and act upon the expert advice provided by TRG and KPMG was motivated by their focus on a sale of the consolidated Far & Wide enterprise to an outside investor for the benefit of Wellspring and LCF, Far & Wide's controlling shareholder, and the benefit of Bakes and McKey, its insider directors, and at the expense of and to the detriment to the interests of the Far & Wide corporate entity.

358. In failing or refusing to rely and act upon the obvious and readily available expert advice provided by TRG and KPMG, Defendants Bakes, McKey, Gremse, and Toll did not act on an informed basis in their management of Far & Wide and therefore breached their fiduciary duties of due care to the Far & Wide corporate entity.

359. As a direct and proximate result of Defendants Bakes, McKey, Gremse, and Toll's breaches of their fiduciary duty of due care, the Far & Wide corporate entity has suffered damages.

360. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT VII
DERIVATIVE CLAIM FOR BY CREDITORS FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY OF DUE CARE
(Defendants Stanton, Feldman, Mariano, Fortin, Wellspring & LCF)

361. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 360 as if set forth fully herein.

362. As of April 2002, Far & Wide was insolvent.

363. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

364. As officers of Far & Wide, Defendants Bakes, McKey, Gremse and Toll owed fiduciary duties of due care to Far & Wide's creditors by virtue of Far

& Wide's insolvency. Officer violations of the fiduciary duty of due care are not exculpated under applicable law or pursuant to Far & Wide's certificate of incorporation.

365. Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, each had knowledge of the fiduciary duties of due care owed by Defendants Bakes, McKey, Gremse and Toll to the Far & Wide corporate entity, and the facts and circumstances of the management and direction of Far & Wide for the benefit of Wellspring and LCF, Far & Wide's controlling shareholders, and for the benefit of Bakes & McKey, its insider directors, at the expense of and to the detriment to the interests of the Far & Wide corporate entity.

366. In particular, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, each had knowledge of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally between February 2002 and September 2003. They also had knowledge of the reasonableness and availability of the expert advice provided TRG and KPMG but did not exercise individual or collective authority to cause Far & Wide to act or rely upon the expert advice provided by TRG and KPMG.

367. In failing or refusing to cause Far & Wide to act or rely upon the expert advice provided by TRG and KPMG, Defendants Bakes, McKey, Gremse, Toll,

Stanton, Feldman, Mariano and Fortin substantially assisted and knowingly encouraged Defendants Bakes, McKey, Gremse and Toll in their refusal or failure to act or rely upon the expert advice provided by TRG and KPMG.

368. In rendering knowing and substantial assistance to the refusal or failure of Defendants Bakes, McKey, Gremse and Toll to rely or act upon the expert advice provided by TRG and KPMG, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin's aided and abetted Defendant Bakes, McKey, Gremse, and Toll's breaches of their fiduciary duty of due care to the Far & Wide corporate entity.

369. As a direct and proximate result of Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's aiding and abetting of Defendant Bakes, McKey, Gremse, and Toll's breaches of their fiduciary duty of due care to the Far & Wide corporate entity has suffered damages.

370. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT [VIII]
DIRECT CLAIM BY FAR & WIDE CORPORATE ENTITY (DEBTOR) FOR BREACH OF FIDUCIARY DUTY OF LOYALTY
(Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin)

371. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 370 as if set forth fully herein.

372. As of April 2002, Far & Wide was insolvent.

373. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

374. Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, as officers and directors of Far & Wide, owed fiduciary duties to the Far & Wide corporate entity.

375. Pursuant to this fiduciary duty of loyalty, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin were obligated to act in the best interests of the Far & Wide corporate entity, and were forbidden from acting against the interests of the Far & Wide corporate entity.

376. Pursuant to this fiduciary duty of loyalty, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin were forbidden from favoring the interests of Far & Wide's Wellsrpign [sic] and LCF, Far & Wide's controlling shareholders, the interests of Bakes & McKey, its insider directors, or

the interests of themselves, over the interests of the Far & Wide corporate entity.

377. Notwithstanding their fiduciary duties of loyalty to the Far & Wide corporate entity, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin between April 2002 and September 2003, managed and directed Far & Wide for the benefit of Wellspring and LCF, Far & Wide's controlling shareholders, and for the benefit of Bakes and McKey, its insider directors.

378. Defendants' Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's management and direction of Far & Wide for the benefit of Wellspring and LCF, Far & Wide;'s [sic] controlling shareholders, and for the benefit of Bakes and McKey, its insider directors, was at the expense of and to the detriment to the Far & Wide corporate entity and its assets.

379. In managing Far & Wide for the benefit of the Wellspring, LCF, Bakes and McKey, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin breached their fiduciary duty of loyalty to the Far & Wide corporate entity.

380. The decisions to enter into, and the terms of, these October 2002 Ableco and Wellspring transactions were not approved by a majority of disinterested or independent directors, nor were these transactions approved by Far & Wide's minority shareholders.

381. These decisions caused the Far & Wide entity to continue operations outside of bankruptcy protection and resulted in the diminution in value of Far & Wide's assets to a point where Far & Wide did not have any ability to pay its liabilities to its creditors when bankruptcy protection was finally sought in September 2003.

382. As a result, the October 2002 transaction and July 2003 extension were not fair to the Far & Wide corporate entity.

383. This series of actions and decisions to keep Far & Wide out of bankruptcy protection was in conscious disregard of Bakes, McKey, Toll, Gremse, Stanton, Feldman, Mariano, and Fortin's duty to act in the best interests of the Far & Wide corporate entity.

384. In addition, by knowingly engaging in deceptive and unfair trade practices in violation of FDUTPA, Bakes, McKey, Toll, Gremse, Stanton, Feldman, Mariano, and Fortin engaged in knowing violations of the law in further breach of their fiduciary duties to the Far & Wide corporate entity.

385. As a direct and proximate result of Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's breach of their fiduciary duty of loyalty, the Far & Wide corporate entity has suffered damages.

386. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants

and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT IX
DIRECT CLAIM BY FAR & WIDE CORPORATE ENTITY (DEBTOR) FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY OF LOYALTY
(Defendants Wellspring and LCF)

387. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 386 as if set forth fully herein.

388. As of April 2002, Far & Wide was insolvent.

389. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

390. As directors and officers of Far & Wide, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin owed fiduciary duties of loyalty to the Far & Wide corporate entity.

391. In return for their substantial investment in Far & Wide, Wellspring and LCF, as Far & Wide's controlling shareholders, placed four of Wellspring's partners on the Far & Wide's board of directors.

These four directors were Defendants Stanton, Feldman, Mariano and Fortin.

392. These directors appointed by Wellspring and LCF, the controlling shareholders, participated in and directed the decision-making process of Far & Wide's board of directors as of April 2002, when Far & Wide was insolvent.

393. As a result of their majority ownership and their majority position on Far & Wide's board of directors, Wellspring and LCF exercised and maintained control over Far & Wide, including control over the insider directors, Bakes and McKey, who were beholden to Wellspring and LCF for their employment, among other things.

394. As a result of the Wellspring and LCF-appointed directors' control over the decision-making process of Far & Wide's board of directors, Wellspring and LCF, as Far & Wide's controlling shareholders, had knowledge of the fiduciary duties of loyalty they owed to the Far & Wide corporate entity. They also knew of the facts and circumstances of the management and direction of Far & Wide for the benefit the controlling shareholders, Wellspring and LCF, at the expense of and to the detriment to the Far & Wide corporate entity.

395. By controlling the decision-making process of Far & Wide's board through the Wellspring and LCF-appointed directors, Wellspring and LCF rendered substantial assistance to and had knowledge of defendants Bakes, McKey, Gremse, Toll, Stanton,

Feldman, Mariano and Fortin's breaches of their fiduciary duty of loyalty to the Far & Wide corporate entity.

396. In rendering knowing and substantial assistance to the fiduciary breaches of the fiduciary duty of loyalty to the Far & Wide corporate entity committed by Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin, Wellspring and LCF aided and abetted Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin's breaches of their fiduciary duty of loyalty to the Far & Wide corporate entity.

397. As a direct and proximate result of Wellspring and LCF's aiding and abetting of the breaches of the fiduciary duty of loyalty committed by Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin to Far & Wide's creditors, the Far & Wide corporate entity has suffered damages.

398. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT X
DIRECT CLAIM BY FAR & WIDE CORPORATE ENTITY (DEBTOR) FOR BREACH OF FIDUCIARY DUTY OF LOYALTY
(Wellspring and LCF)

399. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 398 as if set forth fully herein.

400. As of April 2002, Far & Wide was insolvent.

401. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

402. As controlling shareholders of Far & Wide, Wellspring and LCF owed fiduciary duties of loyalty to the Far & Wide corporate entity.

403. As controlling shareholders, Wellspring and LCF controlled Far & Wide's board of directors through its appointment of Stanton, Feldman. Mariano, and Fortin.

404. Through its appointed directors, Wellspring and LCF controlled Far & Wide's board of directors and advanced their own interests in earning a substantial return on Wellspring's $45 million investment.

405. Wellspring and LCF's control of Far & Wide's board of directors to advance their own interests came at the expense of the interests of the Far & Wide corporate entity.

406. In controlling Far & Wide's board of directors, Wellspring and LCF engaged in self-dealing in the October 2002 loan transaction. This transaction was not approved by a majority of disinterested or independent directors, or by minority shareholders.

407. In light of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally in October 2002, the decision to enter into and the terms of the Wellspring loan transaction were not fair to the Far & Wide corporate entity.

408. In advancing their own interests through their control of Far & Wide's board of directors, Wellspring and LCF caused the value of Far & Wide's assets to diminish between April 2002 and September 2003.

409. In addition, by causing Bakes, McKey, Toll, Gremse, Stanton, Feldman, Mariano, and Fortin to engage deceptive and unfair trade practices in violation of FDUTPA, Wellspring and LCF further breached their fiduciary duties of loyalty to the Far & Wide corporate entity.

410. As a direct and proximate result the breaches of the fiduciary duty of loyalty committed by Wellspring and LCF, the Far & Wide corporate entity has suffered damages.

411. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants

and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT XI
DIRECT CLAIM BY FAR & WIDE CORPORATE ENTITY (DEBTOR) FOR BREACH OF FIDUCIARY DUTY OF DUE CARE
(Defendants Bakes, McKey, Gremse, and Toll)

412. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 411 as if set forth fully herein.

413. As of April 2002, Far & Wide was insolvent.

414. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

415. As officers of Far & Wide, Defendants Bakes, McKey, Gremse, and Toll owed fiduciary duties of due care to the Far & Wide corporate entity. Officer violations of the fiduciary duty of due care are not exculpated under applicable law or pursuant to Far & Wide's certificate of incorporation.

416. Pursuant to this fiduciary duty of due care, Defendants Bakes, McKey, Gremse, and Toll, were obligated to act on an informed basis with respect to management decisions.

417. In their management of Far & Wide, Defendants Bakes, McKey, Gremse, and Toll were provided with extensive advice from expert consultants including TRG and KPMG regarding the effective management of Far & Wide while Far & Wide was insolvent.

418. In particular, TRG and KPMG advised Defendants Bakes, McKey, Toll and Gremse to:

a. provide accurate financial and booking information to facilitate accurate planning and budgeting;

b. develop a cash budget that was more detailed, accurate, and linked more closely to recent historical performance rather than pure speculation and conjecture;

c. develop a budget based upon Far & Wide's actual needs and disbursements;

d. accept the realities of Far & Wide's industry and current business environment and plan accordingly;

e. develop a budget that actually reflects rather than estimates travel booking and revenue forecasts;

f. develop a booking and revenue report that tracks cumulative data to accurately reflect the true financial position of the company;

g. develop a Plan B in the event a sale of the company to an outside investor is not successful and in the event the Company's

revenue level remains inadequate, that restructures the company according to the company's actual performance and outlook;

h. develop and implement a plan that makes significant cost reductions and closes unproductive business units;

i. dedicate limited resources for generating booking revenue in 2002, rather than sales for 2003; and

j. demonstrate how Far & Wide could be self-sufficient without taking on more debt.

419. The expert advice from both TRG and KPMG was readily available to Defendants Bakes, McKey, Gremse, and Toll and was communicated in face to face meetings, telephone conferences and over email between February 2002 and September 2003.

420. In light of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the travel industry generally between February 2002 and September 2003. They had knowledge of the reasonableness of the expert advice provided by TRG and KPMG was obvious.

421. The failure or refusal to rely and act upon the expert advice provided by TRG and KPMG was the product of conduct that exceeds even gross negligence on the part of Defendants Bakes, McKey, Toll and Gremse.

422. Notwithstanding the readily available and obvious expert advice provided by TRG and KPMG, Defendants Bakes, McKey, Gremse, and Toll refused or failed to follow this advice in their management of Far & Wide.

423. Defendants Bakes, McKey, Gremse, and Toll's failure or refusal to rely and act upon the expert advice provided by TRG and KPMG was not in good faith as it furthered their own self-interest and not the interests of the Far & Wide corporate entity.

424. Rather, Defendants Bakes, McKey, Gremse, and Toll's failure or refusal to rely and act upon the expert advice provided by TRG and KPMG was motivated by their focus on a sale of the consolidated Far & Wide enterprise to an outside investor for the benefit of Wellspring and LCF, Far & Wide's controlling shareholder, and the benefit of Bakes and McKey, its insider directors, at the expense of and to the detriment to the interests of the Far & Wide corporate entity.

425. In failing or refusing to rely and act upon the obvious and readily available expert advice provided by TRG and KPMG, Defendants Bakes, McKey, Gremse, and Toll did not act on an informed basis in their management of Far & Wide and therefore breached their fiduciary duties of due care to the Far & Wide corporate entity.

426. As a direct and proximate result of Defendants Bakes, McKey, Gremse, and Toll's breaches

of their fiduciary duty of due care, the Far & Wide corporate entity has suffered damages.

427. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT XII
DIRECT CLAIM BY FAR & WIDE CORPORATE ENTITY (DEBTOR) FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY OF DUE CARE
(Defendants Stanton, Feldman, Mariano, Fortin, Wellspring, and LCF)

428. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 427 as if set forth fully herein.

429. As of April 2002, Far & Wide was insolvent.

430. Accordingly, as of April 2002, the residual beneficiaries of the corporate estate of Far & Wide were its creditors.

431. As officers of Far & Wide, Defendants Bakes, McKey, Gremse and Toll owed fiduciary duties of due care to Far & Wide's creditors by virtue of Far & Wide's insolvency. Officer violations of the fiduciary

duty of due care are not exculpated under applicable law or pursuant to Far & Wide's certificate of incorporation.

432. Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, each had knowledge of the fiduciary duties of due care owed by Defendants Bakes, McKey, Gremse and Toll to the Far & Wide corporate entity, and the facts and circumstances of the management and direction of Far & Wide for the benefit of Wellspring and LCF, Far & Wide's controlling shareholders, and for the benefit of Bakes & McKey, its insider directors, at the expense of and to the detriment to the interests of the Far & Wide corporate entity.

433. In particular, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin, each had knowledge of Far & Wide's dire financial condition, its outstanding obligations, its poor sales performance, and the performance of the travel industry generally between February 2002 and September 2003. They also had knowledge of the reasonableness and availability of the expert advice provided TRG and KPMG but did not exercise individual or collective authority to cause Far & Wide to act or rely upon the expert advice provided by TRG and KPMG.

434. In failing or refusing to cause Far & Wide to act or rely upon the expert advice provided by TRG and KPMG, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin substantially

assisted and knowingly encouraged Defendants Bakes, McKey, Gremse and Toll in their refusal or failure to act or rely upon the expert advice provided by TRG and KPMG.

435. In rendering knowing and substantial assistance to the refusal or failure of Defendants Bakes, McKey, Gremse and Toll to rely or act upon the expert advice provided by TRG and KPMG, Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano, and Fortin's aided and abetted Defendant Bakes, McKey, Gremse, and Toll's breaches of their fiduciary duty of due care to the Far & Wide corporate entity.

436. As a direct and proximate result of Defendants Bakes, McKey, Gremse, Toll, Stanton, Feldman, Mariano and Fortin's aiding and abetting of Defendant Bakes, McKey, Gremse, and Toll's breaches of their fiduciary duty of due care to the Far & Wide corporate entity has suffered damages.

437. WHEREFORE, Plaintiff prays for judgment of monetary damages against the defendants and in favor of the Far & Wide corporate entity for the amount of damages suffered by the Far & Wide corporate entity as a result of the foregoing count. Plaintiff also seeks pre- and post-judgment interest, attorneys' fees and costs, and such other and further relief the Court deems proper and just.

COUNT XIII[4]
EQUITABLE SUBORDINATION – SECTION 510(c) OF THE BANKRUPTCY CODE
(Defendants Bakes, McKey, Toll, Gremse Stanton, Feldman, Mariano and Fortin)

438. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 437 as if set forth fully herein.

439. The Individual Defendants breached their fiduciary duties of due care, loyalty, and good faith to the Debtors' creditors during the Debtors' insolvency by exercising their authority as directors of the Debtors in the best interests of the Wellspring Defendants rather than the best interests of the Debtors.

440. The Debtors and the Debtors' creditors were directly and proximately damaged as a direct and foreseeable result of the Individual Defendants' breaches of their fiduciary duty.

441. Certain of the Individual Defendants have asserted debt claims against the Debtors based on their purported loans to the Debtors and/or unpaid salary, severance, bonuses, or other compensation purportedly due from the Debtors.

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[4] Counts XI, XII and XIII (formerly counts VII, VIII and IX) were not dismissed by the Court's Order dated November 2, 2007 and, accordingly, are re-alleged verbatim from the original Complaint. Definitions contained in these counts are intended to be the same as defined in the original Complaint.

442. It would be inequitable for any of the Individual Defendants to share in any distributions to the unsecured customer, employee and vendor claims that accrued as a result of the Individual Defendants' own misconduct.

443. Thus, pursuant to 11 U.S.C. § 510(c), the Court should equitably subordinate any unsecured claims of any of the Individual Defendants to the unsecured claims of all other unsecured creditors of the Debtors.

444. WHEREFORE, Plaintiff prays for an order equitably subordinating the claims of the defendants in the related Bankruptcy case. Plaintiff also seeks attorneys' fees and costs and such other and further relief the Court deems proper and just.

COUNT XIV
RECHARACTERIZATION OF
PURPORTED DEBT CLAIMS
(Defendants Wellspring and LCF)

445. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 444 as if set forth fully herein.

446. In return for their substantial investment in the Debtors, the Wellspring Defendants placed four of Wellspring's partners on the Debtors' board of directors.

447. These Wellspring-controlled directors participated in and directed the decision-making process of the Debtors.

448. As a result of their majority position on the Debtors' board of directors, the Wellspring Defendants maintained *de facto* control over the Debtors.

449. The Wellspring Defendants caused the Individual Defendants who served on the Debtors' board of directors to breach their fiduciary duties of due care, loyalty, and good faith to the Debtors and their creditors by exercising their authority as directors in the best interests of the Wellspring Defendants rather than the best interests of the Debtors.

450. The Wellspring Defendants caused the Individual Defendants who served on the Debtors' board of directors to breach their fiduciary duties of due care, loyalty, and good faith to the Debtors' creditors by exercising their authority as directors of the Debtors in the best interests of the Wellspring Defendants rather than the best interests of the Debtors.

451. The Wellspring Defendants rendered substantial assistance to and facilitated the Individual Defendants' breaches of fiduciary duty by exercising its de facto control over the Debtors to benefit the investors in the Wellspring equity funds at the expense of the Debtors' creditors.

452. The Wellspring Defendants also caused the Individual Defendants to cause the Debtors to borrow

funds from the Wellspring Defendants in order to bolster the Wellspring Defendants' secured position in any eventual bankruptcy and to assist the Individual Defendants in continuing to operate the Debtors to its own detriment and the detriment of their creditors.

453. The Wellspring Defendants have asserted secured and unsecured debt claims in excess of $12 million against the Debtors based upon their purported pre-petition loans to the Debtors.

454. These debt claims should be recharacterized as equity claims in light of the Wellspring Defendants' pre-loan equity interests, the obvious inability of the Debtors to ever pay back the loans when made, and the conduct of the Wellspring Defendants in causing the loans to be made while the Debtors were insolvent and while they operated and managed the Debtors.

455. WHEREFORE, Plaintiff prays for an order re-characterizing the claims of the defendants in the related Bankruptcy case. Plaintiff also seeks attorneys' fees and costs and, such other and further relief the Court deems proper and just.

COUNT XV
EQUITABLE SUBORDINATION – SECTION 510(c) OF THE BANKRUPTCY CODE
(Defendants Wellspring and LCF)

456. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 455 as if set forth fully herein.

457. In return for their substantial investment in the Debtors, the Wellspring Defendants placed four of Wellspring's partners on the Debtors' board of directors.

458. These Wellspring-controlled directors participated in and directed the decision-making process of the Debtors.

459. As a result of their majority position on the board of directors, the Wellspring Defendants maintained *de facto* control over the Debtors.

460. The Wellspring Defendants caused the Individual Defendants who served on the Debtors' board of directors to breach their fiduciary duties of due care, loyalty, and good faith to the Debtors and their creditors by exercising their authority as directors of the Debtors in the best interests of the Wellspring Defendants rather than in the best interests of the Debtors and their creditors.

461. The Wellspring Defendants caused the Individual Defendants who served on the Debtors' board of directors to breach their fiduciary duties of due care, loyalty, and good faith to the Debtors' and their creditors during the Debtors' insolvency by exercising their authority as directors of the Debtors in the best interests of the Wellspring Defendants rather than in the best interests of the Debtors and their creditors.

462. The Wellspring Defendants rendered substantial assistance to and facilitated the Individual

Defendants' breaches of fiduciary duty by exercising their *de facto* control over the Debtors in favor of the investors in their equity funds at the expense of the Debtors' creditors.

463. The Debtors and their creditors were directly and proximately damaged as a direct and foreseeable result of Wellspring's aiding and abetting the Individual Defendants' breaches of fiduciary duty.

464. The Wellspring Defendants have asserted secured and unsecured debt claims in excess of $12 million against the Debtors based on their purported pre-petition loans to the Debtors.

465. It would be inequitable for the Wellspring Defendants to share in any distributions to the unsecured customer, employee and vendor creditors that accrued as a result of the Wellspring Defendants' own misconduct.

466. Thus, pursuant to 11 U.S.C. § 510(c), the Court should equitably subordinate any secured and unsecured claims of the Wellspring Defendants to the claims of all other unsecured creditors of the Debtors.

467. WHEREFORE, Plaintiff prays for an order equitably subordinating the secured and unsecured claims of the Wellspring Defendants by relegating such claims to the same level of priority as the interests held by equity security interest holders of Far & Wide. Plaintiff also seeks attorneys' fees and costs and such other and further relief the Court deems proper and just.

COUNT XVI
DISALLOWANCE OF CLAIM - SECTION 502(c) OF THE BANKRUPTCY CODE
(Defendants Wellspring and LCF)

468. Plaintiff incorporates into this Count the allegations set forth in paragraphs 1 through 467 as if set forth fully herein.

469. In return for their substantial investment in the Debtors, the Wellspring Defendants placed four of Wellspring's partners on the Debtors' board of directors.

470. These Wellspring-controlled directors participated in and directed the decision-making process of the Debtors.

471. As a result of their majority position on the board of directors, the Wellspring Defendants maintained *de facto* control over the Debtors.

472. The Wellspring Defendants caused the Individual Defendants who served on the Debtors' board of directors to breach their fiduciary duties of due care, loyalty, and good faith to the Debtors and their creditors by exercising their authority as directors of the Debtors in the best interests of the Wellspring Defendants rather than in the best interests of the Debtors and their creditors.

473. The Wellspring Defendants caused the Individual Defendants who served on the Debtors' board of directors to breach their fiduciary duties of due care, loyalty, and good faith to the Debtors' and

their creditors during the Debtors' insolvency by exercising their authority as directors of the Debtors in the best interests of the Wellspring Defendants rather than in the best interests of the Debtors and their creditors.

474. The Wellspring Defendants rendered substantial assistance to and facilitated the Individual Defendants' breaches of fiduciary duty by exercising their *de facto* control over the Debtors in favor of the investors in their equity funds at the expense of the Debtors' creditors.

475. The Debtors and their creditors were directly and proximately damaged as a direct and foreseeable result of Wellspring's aiding and abetting the Individual Defendants' breaches of fiduciary duty.

476. The Wellspring Defendants have asserted secured and unsecured debt claims in excess of $12 million against the Debtors based on their purported pre-petition loans to the Debtors.

477. It would be inequitable for the Wellspring Defendants to share in any distributions to the unsecured customer, employee and vendor creditors that accrued as a result of the Wellspring Defendants' own misconduct.

478. Thus, pursuant to 11 U.S.C. § 502(c), the Court should equitably subordinate any secured and unsecured claims of the Wellspring Defendants to the claims of all other unsecured creditors of the Debtors.

479. WHEREFORE, Plaintiff prays for an order disallowing the secured and unsecured claims of the Wellspring Defendants. Plaintiff also seeks attorneys' fees and costs and such other and further relief the Court deems proper and just.

JURY TRIAL DEMANDED

480. Plaintiff demands a jury trial on all issues of right triable by jury.

Dated this 5th day of December, 2007.

Respectfully submitted,

PODHURST ORSECK, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
Telephone: (305) 358-2800
Facsimile: (305) 358-2382

By: /s/ Alexander Rundlet
Robert C. Josefsberg
Florida Bar No. 040856
rjosefsberg@podhurst.com
Alexander Rundlet
Florida Bar No. 0692301
arundlet@podhurst.com

Special Counsel for Plaintiff Barry Mukamal, as Liquidating Trustee and Directos [sic] *and Officer Trustee of Far & Wide Corporation et al.*

[Certificate Of Service Omitted In Printing]

No. 10-939

In The Supreme Court of the United States

BARRY E. MUKAMAL, AS LIQUIDATING TRUSTEE AND DIRECTOR AND OFFICER TRUSTEE OF THE LIQUIDATING TRUST AND THE DIRECTORS AND OFFICERS TRUST OF FAR & WIDE CORPORATION, FAR & WIDE TRAVEL CORPORATION, ADVENTURE CENTER, INC., AFRICAN TRAVEL, INC., FAR & WIDE INTERNATIONAL, INC., AND TRAVEL MEDIA SERVICES CORP.,

Petitioner,

v.

PHIL BAKES; ANDREW C. MCKEY; CRAIG TOLL; GEORGE GREMSE; LOAN CAPITAL FUNDING, LLC; WELLSPRING CAPITAL MANAGEMENT LLC; CARL M. STANTON; GREG S. FELDMAN; DAVID C. MARIANO; AND JASON B. FORTIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID A BARRETT
CHRISTOPHER E DUFFY
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, New York 10022
(212) 446-2300

STUART H. SINGER
(*Counsel of Record*)
ssinger@bsfllp com
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
(954) 356-0011

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342 2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the unpublished opinion of a unanimous panel of the court of appeals, affirming the dismissal of claims governed exclusively by Delaware law, presents an issue concerning pleading standards for a complaint that merits review by this Court, particularly where petitioner did not raise in the courts below the issue he now raises with this Court for the first time.

PARTIES TO THE PROCEEDING

The petition caption lists Wellspring Capital Funding LLC as a respondent. No entity by that name is a participant in these proceedings. The two respondents not listed by petitioner in the caption are Loan Capital Funding, LLC, and Wellspring Capital Management LLC. The caption of this brief reflects these corrections.

CORPORATE DISCLOSURE STATEMENT

Respondent Loan Capital Funding, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock. Respondent Wellspring Capital Management LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition here does not warrant this Court's review. The decision below involves the application of state, not federal, law. The purported "issue" concerning pleading standards that is raised in the petition was neither briefed nor argued in the district court or in the court of appeals because any difference in those standards was not in those courts – and is not here – determinative of the outcome. The unpublished, unanimous decision below presents no conflict among the circuits and does not otherwise meet any of the considerations supporting certiorari review set forth in Rule 10 of the Rules of this Court.

Moreover, the entire petition is based on the false premise that the proper standard for evaluating a complaint under Fed. R. Civ. P. 8 is that articulated in *Conley v. Gibson*, 335 U.S. 41 (1957). The petition references *Conley* a total of 28 times, a focus that stands in stark contrast to the total number of times that petitioner cited *Conley* in his initial brief, reply brief, and petition for rehearing in the court of appeals – zero. Petitioner's repeated citations cannot change the fact that this Court has already held that *Conley*'s "no set of facts" standard for evaluating motions to dismiss under Fed. R. Civ. P. 12(b)(6) "has earned its retirement," and "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

The heart of petitioner's argument – that "the traditional standard established in *Conley* remains in place and the clarification of *Conley* should no longer be characterized as imposing any stricter standard" (Petition at 23) – directly contradicts *Twombly*. And even if the argument were not foreclosed by *Twombly*, a case involving substantive issues only of state law surely is not the right vehicle for this Court to address that issue. The Court should deny certiorari.

STATEMENT OF THE CASE

Petitioner Barry E. Mukamal is the trustee of a "litigation trust" created during the chapter 11 bankruptcy proceedings of Far & Wide Corporation ("Far & Wide"), a Delaware-incorporated tour operator that filed for bankruptcy protection in September 2003 in the United States Bankruptcy Court for the Southern District of Florida. (App. 2.) Respondents were directors, officers, and/or investors in Far & Wide. (App. 3.)

Petitioner sued respondents for trying to protect the company's shareholder value during a period of financial turmoil at Far & Wide (which petitioner characterized as a breach of the duty of loyalty), and for not implementing the advice of expert financial consultants they had retained (which petitioner characterized as a breach of the duty of care). (App. 64-66.) Petitioner's amended complaint was based on the theory that at some point between the onset of Far & Wide's financial difficulties and its ultimate

bankruptcy filing, its directors and officers should have stopped exercising their fiduciary duties for the benefit of Far & Wide's shareholders (a group of which several of them were members), and should instead have directed their energies toward protecting Far & Wide's creditors. (App. 65.) Petitioner alleged that respondents' efforts to protect Far & Wide's shareholders caused harm to Far & Wide's individual creditors; that these efforts were in breach of respondents' fiduciary duties to Far & Wide and its creditors; and that the harm that these efforts allegedly caused to each of the individual creditors was the equivalent of harm to Far & Wide itself.

The allegations in the amended complaint centered on the incurrence of additional debt by Far & Wide. (App. 108.) As the district court explained, the amended complaint "alleges that the Individual Defendants were operating Far & Wide with the goal of generating a return for all shareholders alike," a goal that was consistent with their fiduciary duties under Delaware law. (App. 50-51.) Relying on well-settled precedent, the district court emphasized that "the mere act of incurring additional debt in the face of insolvency, alone, does not establish bad faith or disloyalty if the purpose was to maximize the value of the firm as to all shareholders." (App. 51.) Because petitioner premised the amended complaint's fiduciary duty claims "on a divergence of interests as between the Defendants and Far & Wide's creditors, not between Defendants and the entity or its minority

shareholders," the district court dismissed those claims with prejudice. (App. 52-53.)

In an unpublished opinion affirming the district court's partial final judgment against petitioner, a unanimous three-judge panel of the Eleventh Circuit held that, under governing Delaware law, respondents did not have any fiduciary duties to Far & Wide's individual creditors, and that the petitioner's pleadings had failed to allege any breach of fiduciary duty to Far & Wide itself. (App. 16-18, 22-26.) The unpublished opinion also held that respondents "discharged their obligations under the duty of care by hiring consultants and by considering the consultants' advice, even if they did not follow the advice." (App. 26.)

Even after entry of the partial final judgment that is the subject of the instant petition, four counts of petitioner's amended complaint still remain pending in the district court against the five respondents who filed claims in the bankruptcy proceedings for money owed to them by Far & Wide (including a $10 million loan from respondent Loan Capital Funding, LLC). Those pending claims, which are not at issue here, seek to subordinate, recharacterize or disallow those monetary claims against the bankruptcy estate. (App. 160-68.)

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW TURNS ON DELAWARE LAW, THE APPLICATION OF WHICH DOES NOT WARRANT THIS COURT'S REVIEW.

The court of appeals' unpublished opinion in this case involved an extensive analysis of the scope of corporate fiduciary duties under Delaware law. Petitioner has mischaracterized the opinion, however, as one rooted primarily in federal law. It was not. Indeed, petitioner himself noted the importance of Delaware law to the court of appeals' opinion when he filed a petition for rehearing that posited the following question as meriting further review by the court of appeals: "Whether the panel overlooked a decisive Delaware precedent that confirms the viability of the Amended Complaint's Direct-Debtor duty of loyalty claims even if Delaware law applies." (The other question presented by the rehearing petition was whether the unpublished opinion incorrectly applied Florida's choice-of-law rules to conclude that Delaware law, rather than Florida law, applied to the substance of petitioner's claims.) Petitioner does not even contend that the issues surrounding the interpretation and application of Delaware law are worthy of this Court's review.[1]

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[1] As part of petitioner's misdirected effort to reframe the court of appeals' unpublished opinion as one that hinges on matters of federal law rather than Delaware law, he now claims that he "takes no issue with the lower courts' interpretation of

(Continued on following page)

The court of appeals' opinion contained an extensive analysis of Delaware law on the fiduciary duties of corporate officers and directors. The opinion cited 15 decisions from Delaware state courts, and one Delaware treatise. Even the petition includes a discussion of several Delaware cases that this Court would need to evaluate in detail in order to decide whether pleading standards were properly applied. (Petition at 19.) The prominence of state substantive law in this case sharply distinguishes it from *Twombly* and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), both of which turned on application of Rule 8 pleading standards to claims involving federal substantive law – the Sherman Act in *Twombly*, and the U.S. Constitution in *Iqbal* (a *Bivens* action).

Thus, unlike in *Twombly* or *Iqbal*, further review of this case for purposes of developing the case law on Rule 8 pleading standards would require the Court to undertake an extensive analysis of state substantive law. Yet the court of appeals, like the district court before it, has already performed a comprehensive examination of relevant Delaware authorities, and properly determined that Delaware law does not

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state law." (Petition at 17.) That is a far cry from the position he took before the court of appeals, where he argued strenuously for the application of Florida rather than Delaware law, and simultaneously argued that, to the extent Delaware law applies, the district court had misinterpreted key Delaware decisions Then, in seeking panel rehearing, he claimed that the unpublished opinion was in error because (1) it misapplied Florida's choice-of-law rules, and (2) "overlooked a decisive Delaware precedent." Petitioner did not seek rehearing *en banc*.

recognize petitioner's claims. *See, e.g.*, App. 20-26 (portion of Eleventh Circuit's analysis of Delaware cases); *see also* App. 17-18 ("Because directors and officers do not owe a fiduciary duty to creditors, even after insolvency, the district court correctly dismissed the Debtors' creditors' direct claims for breach of fiduciary duty.") (interpreting *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)); App. 22 ("In order to state a claim for breach of the duty of loyalty, the Trustee must allege facts that indicate either Far & Wide or its minority shareholders, not Far & Wide's creditors, were injured by the action of the Individual Defendants. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d at 361 (stating that breach of the duty of loyalty can exist where a fiduciary pursues his own interest over that of the shareholders)."); App. 22 ("Delaware law, however, does not recognize a cause of action for 'deepening insolvency.'").

The Eleventh Circuit's analysis of Delaware law was the centerpiece of its unpublished opinion. This Court, for good reason, does "not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law." *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 368 (1999); *see also, e.g., Runyon v. McCrary*, 427 U.S. 160, 181 (1976) ("We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law"). Here, where Delaware law is central to the court of appeals' rejection of petitioner's claims,

the Court should follow its long-standing precedent and deny the petition.

Finally, petitioner does not even argue – and nothing in the unpublished opinion below suggests – that the court of appeals would have reached a different outcome even if it had applied the abrogated *Conley* standard. Because the application of the legal standard that petitioner contends should apply would not change the outcome of the case, petitioner essentially seeks an advisory opinion. This is not an appropriate basis for certiorari.

II. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS.

No circuit split exists with respect to the question of whether *Twombly* and *Iqbal* "simply reaffirmed the *Conley* standard" as posited by petitioner. (Petition at 17.) No court of appeals has adopted that formulation, notwithstanding petitioner's efforts to suggest that the Second, Seventh and Eighth Circuits have done so. To the contrary, all three of those circuits have expressly stated that the former *Conley* standard has been displaced by the new, higher standard articulated in *Twombly* and *Iqbal*. Contrary to the heading of point II of the petition here, the courts of appeals are not "deeply divided" about this issue. They are not divided at all.

A review of relevant decisions makes clear that the purported circuit split identified by petitioner does not in fact exist. For example, the Second Circuit case cited by petitioner, *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008), acknowledges that *Twombly* "explicitly rejected" the *Conley* articulation of Rule 8 pleading requirements, and acknowledged that *Twombly* established a "new standard for assessing pleadings under Rule 8(a)." *Id.* at 213. Petitioner simply ignores these portions of *Boykin*, which plainly contradict his assertion that the "Second Circuit holds that *Twombly* did not require a 'heightened' pleading standard." (Petition at 21 (citing *Boykin*).)

Likewise, notwithstanding petitioner's incorrect assertion that the Seventh Circuit "does not regard it as a new standard," that court has expressly characterized *Twombly* (and *Iqbal*) as embodying "the Supreme Court's *new pleading rule*." *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (emphasis added). The Seventh Circuit decision cited at pages 20 and 21 of the petition, *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009), does not indicate anything whatever to the contrary (and indeed does not even mention *Conley*).

Petitioner also misunderstands the Eighth Circuit's decision in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). By replacing a single word with a bracketed substitute at page 22 of the petition, petitioner mischaracterizes *Braden* as standing for the proposition that *Twombly* and *Iqbal* did not change the Rule 12(b)(6) analysis in federal

courts. *Braden* does nothing of the sort. What the Eighth Circuit actually said in the misquoted portion of *Braden* is that *Twombly* and *Iqbal* did not change the requirement that "on a motion to dismiss, inferences are to be drawn in favor of the non-moving party." *Braden*, 588 F.3d at 595. *Braden* did *not* contain any conclusion that *Twombly* or *Iqbal* "simply reaffirmed the *Conley* standard," as is contended at page 17 of the petition. Indeed, the Eighth Circuit has expressly stated elsewhere that by "establishing a plausibility standard for motions to dismiss" in *Twombly*, this Court was "*overruling Conley v. Gibson*." *Gregory v. Dillards, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009) (en banc) (emphasis added), *cert. denied*, 130 S. Ct. 628 (2009); *see also, e.g.*, *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 595 (8th Cir. 2009) (affirming dismissal of amended complaint for failure to state a claim, while recognizing that "the district court had noted that the Supreme Court's recent decision in [*Twombly*] had created a *higher pleading standard* than the standard in *Conley v. Gibson*") (emphasis added), *cert. denied*, 130 S. Ct. 3506 (2010).

Petitioner has attempted to manufacture the appearance of a circuit conflict in the application of *Twombly* and *Iqbal*. No such split exists. Indeed, petitioner cannot cite a single federal appellate decision that (when properly read) is in conflict with the Eleventh Circuit's decision in this case – which in any event is unpublished and non-precedential. *See* Sup. Ct. R. 10(a) (in deciding whether "compelling reasons" exist to grant certiorari, the Court considers

whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

Indeed, the petition's lack of merit is perhaps best highlighted by the first three words on page 1 of the Eleventh Circuit's opinion: "DO NOT PUBLISH." (App. 1.) The Eleventh Circuit's rules are clear that "Unpublished opinions are not considered binding precedent." *See* 11th Cir. R. 36-2. No basis exists for this Court to review an unpublished, non-binding decision that does not conflict with a decision of any other federal appellate court.

III. PETITIONER DID NOT RAISE THE ISSUE ON WHICH HE NOW SEEKS THIS COURT'S REVIEW IN THE DISTRICT COURT OR THE COURT OF APPEALS, AND THUS HAS WAIVED IT.

The district court expressly addressed *Twombly* in its order dismissing petitioner's fiduciary duty claims, which preceded issuance of the partial final judgment that was before the court of appeals. (App. 32, 50.) In discussing *Twombly*, the district court explained that the "previous standard that there be 'no set of facts' before a motion to dismiss is granted has thus been abrogated in favor of the requirement that a pleading must be 'plausible on its face.'" (App. 32.) The abrogated "no set of facts" standard to which the district court alluded was, of course, the one set

forth in *Conley v. Gibson*, 355 U.S. 41 (1957), which the district court also expressly addressed in dismissing petitioner's claims. (App. 32.)

Notwithstanding the district court's express discussion of the differences between the old *Conley* standard and the new *Twombly* standard, petitioner did not mention either of these decisions, or *Iqbal*, in either of his two briefs in the court of appeals. As a result, there was no argument (and presumably no consideration) in the court of appeals concerning the contours of the standard set forth in *Twombly*, or the ways in which that standard might be similar to or different from the prior *Conley* standard. Petitioner has thus waived any consideration by this Court of the question whether the *Twombly/Iqbal* standard is stricter than the *Conley* standard. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court, however, is one of final review, not of first view.") (internal quotation marks omitted); *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."); *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982) ("This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it.").

Finally, petitioner's waiver of his meritless argument for certiorari is underlined by the fact that he did not even raise the argument – or even mention

any of *Twombly*, *Iqbal* or *Conley* – in his petition for rehearing in the court of appeals. Having ignored three chances in the courts below to make his *Conley* claim, petitioner has presented no basis to support this Court hearing it for the first time.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STUART H. SINGER
(*Counsel of Record*)
ssinger@bsfllp.com
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
(954) 356-0011

DAVID A. BARRETT
CHRISTOPHER E. DUFFY
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, New York 10022
(212) 446-2300

Attorneys for Respondents

No. 10-939

Supreme Court, U.S.
FILED
MAR 8 - 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BARRY E. MUKAMAL, AS LIQUIDATING TRUSTEE AND DIRECTOR AND OFFICER TRUSTEE OF THE LIQUIDATING TRUST AND THE DIRECTORS AND OFFICERS TRUST OF FAR & WIDE CORPORATION; FAR & WIDE TRAVEL CORPORATION; ADVENTURE CENTER, INC.; AFRICAN TRAVEL, INC.; FAR & WIDE INTERNATIONAL, INC ; AND TRAVEL MEDIA SERVICES CORP.,

Petitioner,

v.

PHIL BAKES; ANDREW C. MCKEY; CRAIG TOLL; GEORGE GREMSE; WELLSPRING CAPITAL FUNDING LLC; CARL M. STANTON; GREG S FELDMAN; DAVID C. MARIANO; AND JASON B. FORTIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS R. JULIN
Counsel of Record
CRAIG V. RASILE

HUNTON & WILLIAMS LLP
Sabadell Financial Center
1111 Brickell Avenue – Suite 2500
Miami, FL 33131
(305) 810-2516 fax 1601
tjulin@hunton.com

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Respondents are incorrect regarding all three points they raise in opposition to the petition. The decision below does not turn on state law. It is based on the Eleventh Circuit's holding that this Court has adopted a "stricter" pleading standard than the standard articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), and required by Federal Rule of Civil Procedure 8(a). The Eleventh Circuit's decision is in conflict with many decisions of other courts of appeals. The plaintiff/petitioner did raise the issue that he now asks the Court to review.

STATEMENT OF THE CASE

In describing the allegations of the amended complaint, the respondents, like the Eleventh Circuit, disregard plain and concise factual allegations that the respondents inflicted harm on the corporation they served as directors and officers through acts of self-dealing in disregard of independent consultants and generally accepted accounting principles and Financial Accounting Standard Board regulations. (Petition at 4-5).

Only this disregard allows them to characterize the amended complaint as alleging only that the respondents "should have stopped exercising their fiduciary duties for the benefit of Far & Wide's shareholders (a group of which several of them were members), and should instead have directed their energies

toward protecting Far & Wide's creditors." (Opposition at 3). They cite for this misdescription page 65 of the appendix. That page contains the actual allegations of the amended complaint that the respondents' actions "were not in good faith," that they were "in conscious disregard" of their fiduciary duties to maximize shareholder value, and that they "were motivated by advancing" their own interests "at the expense of and to the detriment to the value of Far & Wide's assets." (App. 65).

Counts VIII through XII did *not* contend, as the respondents assert, that the respondents breached duties that the respondents owed to creditors. They clearly and specifically alleged that the respondents' acts of self-dealing breached their duties to the corporation. (App. 145-59).

For their mischaracterization of the amended complaint, the respondents also rely heavily on the district court's misdescription of the pleading, rather than the pleading itself (Opposition at 3) ("the district court explained . . . the district court emphasized. . . . "). The breach of fiduciary duty and loyalty allegations of counts VIII through XII were not "premised . . . 'on a divergence of interests as between the Defendants and Far & Wide's creditors'" (Opposition at 3) (quoting the district court), they were explicitly based on the divergence of interests as between the respondents and *the corporation* and the actions of the respondents in conscious disregard of *the corporation's* interests. (App. 145-59). Paragraph 365, for example, of Count VII, alleged the respondents'

actions were for their own benefit "at the expense of and to the detriment to the interests of *the Far & Wide corporate entity*." (App. 143) (emphasis added). Paragraph 378 of Count VIII alleged that the respondents' actions were for their own benefit "at the expense of and to the detriment of the *Far & Wide corporate entity and its assets*." (App. 146) (emphasis added). Paragraph 394 of Count IX alleged the respondents breached "their fiduciary duty of loyalty to *the Far & Wide corporate entity*." (App. 150) (emphasis added). Counts X through XII similarly focused on actions of the respondents in derogation of the corporation's interests, not the corporation's creditors' interests. (App. 152, 156, 159). These general allegations within the counts were backed with specific factual allegations showing precisely how the respondents had used corporate assets for their own interests and in derogation of corporate interests. (App. 90-117). Fairly read under the pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), as explicated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), counts VIII through XII can be read in no other way than as providing clear and concise notice to the respondents that the plaintiff intended to prove that the respondents engaged in classic acts constituting breaches of fiduciary duty to the corporation.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Turns On a Critical Interpretation of a Federal Rule of Civil Procedure

The respondents' initial point – that the decision below "turns on" Delaware law (Opposition at 5) – is of no moment here. While the parties did not agree below regarding how Delaware law or Florida choice of law rules should be interpreted,[1] the plaintiff is not seeking review of these state law rulings. The plaintiff accepts those rulings and shows in its petition that the Eleventh Circuit was able to affirm dismissal of the amended complaint only by holding that this Court adopted a "stricter" pleading standard in *Twombly* and *Iqbal* than that adopted in *Conley*. This aspect of the Eleventh Circuit opinion allowed it to ignore the clear and concise factual allegations that the respondents breached their fiduciary duties to Far & Wide as those duties are defined by the Eleventh Circuit's interpretation of Delaware law.

Respondents contend that this Court "would need to evaluate in detail" Delaware law "in order to decide whether pleading standards were properly applied." (Opposition at 6). This is incorrect. The plaintiff expressly accepted the Eleventh Circuit's interpretation of Delaware law and has asserted only that the

---

[1] The resolution of this dispute resulted in affirmance of dismissal of counts I through VII of the amended complaint, counts that are not at issue in this Court

allegations of the complaint state a claim under that interpretation of Delaware law. The essential principles of Delaware law at issue are set forth clearly in the Eleventh Circuit's opinion and they are principles that are very familiar to the Court. For example, the opinion recites that "Under Delaware law, '[t]he essence of the duty of loyalty is that "corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests."'" (App. 20). It further explains that "'The fiduciary duty of care requires that directors of a Delaware corporation use that amount of care which ordinarily careful and prudent men would use in similar circumstances, and consider all material information reasonably available in making business decisions.'" (App. 25) (quoting *In re Walt Disney Co.*, 907 A.2d 693, 749 (Del. Ch. 2005)). Obviously, these are elementary principles that require no elaborate evaluation and that makes this case ideal to address whether the Court has established a "stricter" pleading standard. It can be easily seen from a comparison of the allegations of the amended complaint to the Eleventh Circuit's interpretation of Delaware law that the plaintiff's claim would have survived the pleading standard of *Conley* and was dismissed solely because the Eleventh Circuit believed that a stricter pleading standard is now in place that permitted it to ignore many of the plausible factual allegations that were made.

Respondents argue that the "prominence of state substantive law in this case sharply distinguishes it

from *Twombly* and *Ashcroft v. Iqbal*." (Opposition at 6). Whether the underlying claim is state or federal law makes no difference. Federal claims have no greater dignity here than state claims and given that the plaintiff makes no attack on the Eleventh Circuit's interpretation of state law, examination of the federal pleading standard poses no greater challenge than in a case brought under federal law. Indeed, examination of the federal pleading standard in a case such as this will be far easier because the case involves no complex statutory problems like those present in *Twombly* and *Iqbal*. Instead, it is rooted in well-established common law principles.

Nothing in the petition asks the Court to disturb its longstanding disposition against displacing a considered judgment on an issue whose resolution is heavily contingent upon an analysis of state law, as the respondents contend (Opposition at 7-8).

The respondents' argument that "petitioner does not even argue . . . that the court of appeals would have reached a different outcome even if it had applied the abrogated *Conley* standard" reflects that the respondents have applied just as jaundiced an eye to the petition as the Eleventh Circuit applied to the amended complaint through its "stricter" pleading standard. The petition could not have been clearer. It stated: "Reversal of the decision below and reinstatement of the amended complaint's claims on behalf of Far & Wide against the defendants should be ordered through application of the *Conley* pleading

standard that was reaffirmed in both *Twombly* and *Iqbal*." (Petition 20).

II. The Courts of Appeals are Deeply Divided on Whether the *Twombly/Iqbal* Standard is Stricter than the *Conley* Standard

The respondents' second point is also wrong. The courts of appeals and the commentators repeatedly have acknowledged the division that exists not only between the courts of appeals but also within the courts of appeals.

In an article published last year, the authors surveyed many cases and found "initial signs point to a potential conflict between the circuits that may force the Court to revisit the pleading standards for the third time in as many years." Allegra J. Lawrence-Hardy & Nathan D. Chapman, *Clarity or Chaos? Ashcroft v. Iqbal One Year Later*, 4 Bloomberg Finance L.P. No. 39 (2010).

In another article that "examines where things stand with respect to pleading 18 months after *Iqbal*," a different commentator concluded that this Court's decisions in *Twombly* and *Iqbal* "injected uncertainty into an area of the law that has been settled for decades." Claire Prestel, *Pleading Where Things Stand After* Iqbal, 79 BNA Insights 1871 (Jan. 11, 2011). She found that "courts began to cite *Twombly* and *Iqbal* immediately and on a massive scale: within six months, *Iqbal* had been cited in more than 3,520 federal cases; the number now stands at more than

15,000." *Id.* at 1872. "[O]ne recurring theme in the case law is that from the perspective of the federal district courts and the courts of appeals, the Supreme Court's decisions left key questions unanswered." *Id.*

In *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010), for example, Judge Diane P. Wood wrote that federal courts are "still struggling" with the standard, and that in dissent in *Swanson*, Judge Richard Posner described *Iqbal* as "opaque." *Id.* at 403. The respondents would have the Court believe that the pleading standard is now well settled but they ignore the fact that in *Starr v. Sony BMG*, 592 F.3d 314, 328 (2d Cir. 2010), Judge Jon O. Newman described an aspect of *Twombly* as "perplexing."

Iqbal now has been the subject of more than 600 law review articles, some of which defend the decision and others have been "sharply critical, faulting the court for importing summary judgment concepts into the pleading stage, and for acting outside the rules' amendment process." Prestel, *supra* at 1872. Some of the literature has questioned empirical assumptions made by the Court in *Twombly* and *Iqbal*. Arthur Miller, *Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (2011) (pointing to Federal Judicial Center survey suggesting discovery costs had no effect on likelihood of settlement); Alex Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. ___ (forthcoming 2011) (data shows that thinly pleaded cases have done at least as well as complaints in general).

That a division between circuits is now full blown is particularly well illustrated by the instant case which holds that *Twombly* and *Iqbal* adopted a "stricter" pleading standard than that imposed in *Conley* and Third Circuit cases such as *West Penn Allegheny Health System, Inc. v. UPMC,* 627 F.3d 85 (3d Cir. 2010), which specifically rejected a district court's conclusion that judges now must subject pleadings to "heightened scrutiny."

The respondents contend that then-Judge Sotomayor's opinion for the Second Circuit in *Boykin v. KeyCorp,* 521 F.3d 202 (2d Cir. 2008), cannot be read as rejecting the heightened pleading standard adopted by the Eleventh Circuit in the instant case (Opposition at 9), yet the decision itself states "to require more than Rule 8(a)'s 'simplified notice pleading standard' would unjustifiedly impose a heightened pleading requirement on the plaintiff." *Id.* at 212. The respondents similarly quibble about whether other appellate decisions can be read as adhering to the mandate of *Conley* because they contend that *Conley* has been overruled and now all circuits agree with this point. (Opposition at 10) ("Petitioner has attempted to manufacture the appearance of a circuit conflict"). While this plainly is not the case, if it were the case it would speak all the more loudly in favor of granting certiorari to make clear that *Conley* has not been overruled, that the standard imposed by Rule 8(a) remains firmly in place, and that courts ought not be dismissing pleadings such as the amended complaint in this case.

Respondents also argue against issuance of the writ because the Eleventh Circuit elected not to publish its decision in this case. It is apparent that it did so, however, only because its decision follows the erroneous path that it started down in cases such as *American Dental Ass'n v. CIGNA Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). That the Eleventh Circuit regards its adoption of a stricter pleading standard as so well established that it need not publish any further decisions on this point is yet another reason for the Court to grant the writ. Of course, as noted in the petition and as ignored by the respondents, the Eleventh Circuit's adoption of a stricter standard was not in fact well established. It conflicted with its own prior decision in *Randall v. Scott*, 610 F.3d 701, 709 (11th Cir. 2010), holding that *Twombly* and *Iqbal* "did not apply a heightened pleading standard."

III. Petitioner Raised the Issue it Now Seeks to Review

The respondents' third point – that this issue had not been raised – is also incorrect. Plaintiff obviously argued in the district court and in the Eleventh Circuit that under the pleading standard of *Twombly* that both the complaint and amended complaint stated a claim upon which relief can be granted. Specifically, in his initial brief in the Eleventh Circuit, plaintiff argued as his initial point on appeal that "the District Court Erred in Dismissing the Direct Debtor Disloyalty Claims in the Amended

Complaint." (Brief at 17). He cited the Eleventh Circuit's decision in *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008), as providing the appropriate standard of review. That case cited *Twombly* as providing the standard applicable for judging whether allegations of a complaint are sufficient and it made no intimation that *Twombly* should be interpreted as imposing a "stricter" standard than that described in *Conley*. *Id.* at 1303. *Mills* held that a district court must "'accept[ ] the allegations in the complaint as true and construe them in the light most favorable to the plaintiff.'" *Id.* (citation omitted). It correctly quoted *Twombly* as holding that a complaint "'does not need detailed factual allegations, a plaintiff's obligation to provide the ground of his entitled to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 127 S. Ct. at 1964-65. Plaintiff argued for application of the *Conley* standard as it had been explained in *Twombly* and expected the Eleventh Circuit to apply that standard, not a stricter standard under which the court would ignore clear and concise factual allegations.

In the district court, plaintiff relied on the Eleventh Circuit's decision in *Watts v. Florida International Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007), for the proposition that a "'pleading must create "plausible grounds to infer" entitled to relief,'" and directed the Court's attention to *Twombly*. (Docket Entry 54 at 5) (quoting *Watts* and *Twombly*). Nothing in the

Eleventh Circuit's *Watts* decision suggested that *Twombly* later would be interpreted as a "stricter" standard than *Conley* or as a standard allowing federal courts to ignore factual allegations such as those in the complaint and the amended complaint in this case. *Watts* simply quoted the language of *Twombly* that discussed how the *Conley* standard is to be applied. *Id.* at 1295.

Plaintiff had no need to brief whether *Twombly* was a stricter standard than *Conley* because the respondents never claimed that it was and the Eleventh Circuit previously had held that in *Randall* that it is not. (Petition at 22). The Eleventh Circuit simply announced its conclusion that *Twombly* is stricter than *Conley* out of the blue and this then provided its justification for ignoring specific factual pleadings that the respondents inflicted direct harm on the corporate entity through their actions.

Having advocated for the proper pleading standard in the district court and in its appeal, plaintiff had no obligation to raise again this issue by petition for rehearing or rehearing en banc or, indeed, to file any petition for rehearing at all. The rule that issues may not be raised for the first time in the Supreme Court applies where fuller development of the record or exploration of the issues would help ensure that a quality decision is reached, not whereas here, a federal appellate court simply ratchets up a pleading standard beyond what either the federal rules or precedents of the Supreme Court require and then surprisingly uses that higher standard to blind itself

to specific and plausible pleadings. Plaintiff alleged that Bakes and his compatriots lined their pockets with millions of corporate funds without justification. Under *Conley*, that easily would have been sufficient to state a claim. Only by treating *Conley* as overruled and *Twombly* and *Iqbal* as adopting a "stricter" standard could the Eleventh Circuit have ruled otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS R. JULIN
Counsel of Record
CRAIG V. RASILE

HUNTON & WILLIAMS LLP
Sabadell Financial Center
1111 Brickell Avenue – Suite 2500
Miami, FL 33131
(305) 810-2516 fax 1601
tjulin@hunton.com

Dated: March 8, 2011